American University International Law Review

Volume 2 | Issue 2 Article 5

1987

Foreign Attorneys in Japan: The International Practice of Law as a Question of Unfair Trade Practices

Masako C. Shiono

FOREIGN ATTORNEYS IN JAPAN: THE INTERNATIONAL PRACTICE OF LAW AS A QUESTION OF UNFAIR TRADE PRACTICES

Masako C. Shiono*

INTRODUCTION

After World War II, Japan enacted a statute allowing foreign attorneys to practice law in Japan.[1] In 1955, the Japanese government repealed that statute.[2] Since that time, Japanese officials have argued with officials from the United States over whether to allow attorneys from the United States to open offices in Japan. Attorneys from the United States contend that Japan should permit foreign attorneys to provide counsel to American companies operating in Japan.

In April 1986, a group of attorneys from the United States filed a petition (Section 301 Petition) with the Office of the United States Trade Representative (USTR)[3] under section 301 of the Trade Act of 1974.[4] The petitioners alleged that the Japanese regulations preventing foreign attorneys from practicing law constituted illegal nontariff trade barriers to legal services, and violated treaty agreements between Japan and the United States.[5] The attorneys wanted to assist United States businesses in the development of markets through export and

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* J.D. Candidate, 1988, Washington College of Law, The American University.

1. BENGOSHI HŌ, Law No. 205 of 1949, art. 7, *cited in* Fukuhara, *The Status of Foreign Lawyers in Japan*, 17 JAPANESE ANN. INT'L L. 21, 22-37 (1973), *excerpted in* THE JAPANESE LEGAL SYSTEM 595 (H. Tanaka ed. 1976).

2. THE JAPANESE LEGAL SYSTEM, *supra* note 1, at 596.

3. Petition under section 301 of the Trade Act of 1974, as amended, for action against unfair trade practices of the Government of Japan in the international trade facilitation services industry and the international legal services industry [hereinafter Section 301 Petition], *petition filed*, Apr. 11, 1986, *petition denied*, June 9, 1986 (available at the Office of the United States Trade Representative, Washington, D.C.).

4. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 2041, 2041-43 (1974) (codified as amended at 19 U.S.C. §§ 2411-2416 (Supp. III 1985)). The petitioners filed their petition pursuant to 19 U.S.C. §§ 2411, 2412(a)(1), and § 2006 of the Code of Federal Regulations. Section 301 Petition, *supra* note 3, at 1; *see infra* notes 138-40 and accompanying text (giving a more detailed description of the provisions of section 301).

5. Section 301 Petition, *supra* note 3, at 15. The petition alleged that the Japanese government was restricting the ability of attorneys from the United States to provide services because Japan freezes or denies visas to those attorneys. *Id.*; *see infra* note 119 (discussing the origin of the "visa freeze").

investment in Japan.[6] Their action represented an effort to eliminate the trade deficit between Japan and the United States.[7] The petitioners asked the USTR to initiate an investigation to determine whether the United States should retaliate against Japan.[8]

At the time of the petition, Japan had not allowed foreign attorneys to open offices in Japan since 1956,[9] except for the few attorneys who were able to practice law pursuant to a grandfather clause in the 1956 regulations[10] and one attorney who opened a Tokyo office in 1977.[11] The petitioners, who read and speak fluent Japanese, had extensive business interests in Japan and were familiar with Japanese culture and business customs. They claimed that if Japan permitted foreign attorneys to practice foreign law in Japan, the foreign attorneys could help clients in the United States work with Japan in the international business world.[12] These attorneys also argued that the strong role of Japan in the world market and the increased trade imbalance between Japan and the United States necessitated this change.[13] The petitioners alleged that the Japanese government was denying the attorneys from the United States their rights of national treatment and establishment.[14] Japan, however, while recognizing the international trade as-

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6. Section 301 Petition, *supra* note 3, at 2.

7. *Id.* at 56. The petitioners concluded that the failure of the United States to implement section 301 measures will result in a continued $50 billion trade deficit. *Id.*

8. *Id.* at 52.

9. *U.S. Lawyers Allege Trade Barriers*, Wall St. J., Apr. 20, 1982, at 35, col. 2.

10. *Id.* Japan gave United States partnerships special membership status prior to 1955. *Id.* Under the 1956 regulations, Japan admitted a few attorneys from the United States to practice law under a grandfather clause. *Id.*

11. *Id.*; *see* Kanter, *The Japan-United States Treaty of Friendship, Commerce and Navigation: Lawyers as Treaty Traders*, 8 U. HAW. L. REV. 339, 340 n.3 (1986) (noting that Japan admitted one New York law firm in 1977), *reprinted in* Section 301 Petition, *supra* note 3, Exhibit H.

12. Section 301 Petition, *supra* note 3, at 2. The petitioners claimed that the American businesses in Japan desperately need the trade and legal services that attorneys from the United States can provide. *Id.*

13. *Id.* at 50.

14. *Id.* at 10-13 (discussing the provisions under the Treaty of Friendship, Commerce, and Navigation that cover the rights of national treatment and establishment). Article VII(1) states:

> 1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly by agent or through the medium of any form of lawful juridical entry. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which

pect of the issue, considered the issue a question of domestic law involving the right to regulate foreign professionals.[15]

On March 28, 1986, the Japanese Ministry of Justice introduced a bill in the Diet[16] amending the *Bengoshi Hō*,[17] the law regulating practicing attorneys in Japan.[18] After months of negotiations between officials of the Japanese Ministry of Justice and negotiators from the office of the USTR, the Japanese government agreed to modify its restrictions against foreign attorneys. The petitioners objected to the proposed law[19] and filed a Section 301 Petition in response to the bill.[20] The petitioners believed that the new regulations would not remove barriers against foreign attorneys and in fact would make it more difficult for foreign businesses and foreign attorneys to function in the Japanese

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> they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VII, para. 1, 4 U.S.T. 2063, 2069, T.I.A.S. No. 2863, at 8, 206 U.N.T.S. 143, 198 [hereinafter FCN Treaty]. Article XXII(1) defines "national treatment" as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." FCN Treaty, *supra*, art. XXII, para. 1.

15. Position Paper of the Japanese Side on Foreign Lawyers Issue for the Coming Consultation 3 (enclosed with an undated letter of approximately October 25, 1985 from Michihiko Kunihiro, Director General, Economic Affairs Bureau, Minister of Foreign Affairs, to Michael B. Smith, Deputy United States Trade Representative), *cited in* Kanter, *supra* note 11, at 346 n.22. The Position Paper stated:

> [I]t is basically an issue regarding each country's lawyers system. It is a question of how each country should cope with the trend of internationalization and the increase in demand for international legal work. Specifically it is a question of how much scope should be granted in each country while maintaining harmony with the lawyers system in that country.

Id.

16. The Japanese Diet is the equivalent of the United States Congress. THE JAPANESE LEGAL SYSTEM, *supra* note 1, at 38. The Diet is a bicameral legislature composed of the *Shugi-in* (House of Representatives) and the *Sangi-in* (House of Councillors). *Id.*

17. Section 301 Petition, *supra* note 3, at 34.

18. BENGOSHI HŌ, Law No. 205 of 1949, *cited in* Fukuhara, *supra* note 1, at 595. The *Bengoshi Hō* is the statute governing *bengoshi*, or practicing attorneys. *Id.*; *see infra* notes 46 and 51 (providing the origins of the term "*bengoshi*," and describing the process of becoming a *bengoshi*).

19. Special Measures Law Concerning the Handling of Legal Business By Foreign Lawyers (amending the *Bengoshi Hō*) [hereinafter Foreign Attorneys Law], introduced Mar. 28, 1986, passed May 16, 1986, *translated in* Section 301 Petition, *supra* note 3, Exhibit A (translating the bill presented to the Japanese Diet on March 28, 1986).

20. *See* Section 301 Petition, *supra* note 3, at 9 (alleging that the bill will attach restrictions on the petitioners' ability to provide legal services).

market.[21] On June 9, 1986, the USTR dismissed the petition without prejudice and decided not to initiate an investigation into the alleged unfair trade barriers.[22] The USTR based its decision on progress in negotiations on foreign access to the legal services market and the bill the Diet passed on May 16, 1986.[23]

The number of attorneys practicing international law has increased to meet the needs of a growing international business community.[24] Many law firms maintain offices in foreign countries.[25] Those offices must comply with the restrictions of the host country on the scope of the foreign attorney's legal practice.[26] The Section 301 Petition was an unusual attempt to change these restrictions because it framed the foreign practice of law as an issue of unfair trade restrictions between two countries.[27]

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21. *Id.*

22. *See* Notice, 51 Fed. Reg. 21,037 (1986) (posting notice of the denial of the petition). Although the Office of the United States Trade Representative denied the petition, it made its determination without prejudice to any future petition on the same subject. *Id.*

23. *Id.*

24. *See* Comment, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1767 (1983) [hereinafter Comment, *Providing Legal Services*] (noting the reasons for the rise of attorneys from the United States in the international sphere). Among the reasons for the rise in the number of attorneys from the United States are native fluency in English, which has become the language of international negotiations and contracts; experience in international business transactions; and the American attorney's unique style of commercial-oriented creative legal skills that is helpful in facilitating international business deals. *Id.* at 1768.

25. *Id.* at 1767.

26. *See* Lund, *Problems and Developments in Foreign Practice*, 59 A.B.A. J. 1154, 1154 (1973) (noting that foreign attorneys who want to conduct business in a foreign country confront the interest of that nation in protecting the public from incompetence, maintaining national standards of professional integrity, and satisfying members of the local legal profession that they will not lose business to the foreign legal professionals); *see also* Comment, *Providing Legal Services*, *supra* note 24, at 1776 n.43 (comparing the restrictions of eighteen countries on the admission of attorneys from the United States to practice law, based on criteria such as years of schooling, years of training, citizenship, or additional examinations).

27. *See* Kanter, *supra* note 11, at 340 (noting that the difference in the willingness of the two countries to accommodate reciprocal business institutions is a serious trade issue). Attorneys in the United States allege that Japan denies visas to keep attorneys from the United States out of Japan. *U.S. Lawyers Allege Trade Barriers*, *supra* note 9, at 35, col. 2; *see* Hayden, *To Be or Not to Bengoshi in Japan*, 59 LAW INST. J. 118, 119 (1985) (noting the expansion of a visa dispute into the broad issue of the right of the attorney from the United States to practice in Japan). In March 1982, the United States officially informed the Japanese government that it considered the Japanese restrictions on foreign law offices in Japan a nontariff barrier to trade in legal services. Shapiro, *Reclaiming a Place for Foreign Lawyers in Japan*, Japan Times, Oct. 17, 1982, at 12, col. 2 [hereinafter Shapiro, *Reclaiming A Place*], *cited in* Kanter, *supra* note 11, at 342 n.21.

This Comment provides an overview of some important aspects of Japanese culture that affect "doing business" in Japan. Part I looks at the background of the dispute over the foreign practice of law in Japan and discusses the role of the law and attorneys in Japan. Part II examines restrictions the United States places on foreign attorneys and the status of foreign attorneys in Japan at the time of the Section 301 Petition. Part III discusses section 301 of the Trade Act of 1974 and the petitioners' arguments. Part III also discusses the arguments of the European Business Council and the American Chamber of Commerce in Japan opposing the revision to the Practicing Attorneys' Law. Part IV discusses why the decision of the USTR not to initiate an investigation was correct, considering both the cultural and professional factors relevant in this dispute.

I. HISTORICAL PERSPECTIVE

A. ATTORNEYS AND THE LAW IN JAPAN

To understand the opposition of the Japanese legal profession to foreign legal professionals practicing in Japan, it is necessary to understand the conceptual differences between the practice of law in the United States and in Japan. Both the law and attorneys have different roles in their respective cultural settings.[28] The view of the law in Japanese society and the different roles of Japanese legal professionals and foreign attorneys contribute to the history of the restrictions on foreign attorneys.

1. The Japanese Concept of Law

In Western societies, the term "law" usually implies both a body of legal rules and the protection of an individual's subjective interests.[29] In Japan, however, *hō* or *hōritsu*, which is translated as "law," means only an objective body of legal rules.[30] This term, therefore, does not imply the protection of an individual's subjective interests, as in Western societies.

In Japanese society, a person must follow traditional rules of con-

28. *See* Kanter, *supra* note 11, at 340-41 (noting that the Japanese business enterprises depend on the *sōgō shōsha*, or trading companies, for international trade facilitation services, whereas companies in the United States depend on attorneys to provide these services).

29. YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW 159 (1976). The legal rules are objective, and individual interests subjective. *Id.*

30. *Id.* To the Japanese, objective law as the Western nations define it implies constraints and is therefore undesirable. *Id.*

duct, sometimes called the rules of *giri*.[31] Under *giri*, a person's social status determines the way society expects a person to behave toward others.[32] There are six main characteristics of *giri*: (1) *giri* is a duty to behave in a certain way toward another person, depending on the situation; (2) the person to whom *giri* is owed does not have the right to demand fulfillment of *giri*;[33] (3) the relations of *giri* are perpetual — even after a person fulfills an obligation, new duties constantly arise; (4) *ninjo*, or feelings of affection, form the basis of *giri* relationships — a person acts, or at least a person should appear to act, for reasons of *ninjo* as well as *giri*; (5) *giri* relationships derive from a hierarchical order similar to feudalism; and (6) a concept of honor, not public constraint, enforces *giri*. Japanese society seriously dishonors those who do not fulfill *giri*.[34]

Japanese society perceives subjective interests differently than Western society. The Japanese word for subjective interests, *kenri*, developed around 1870, when Western law was first introduced into Japan.[35] Enforcement of *kenri* assumes the equality of all people before the law. This conflicts with the feudalistic pattern of social relationships under *giri* because having a body of social rules based on rank in society necessarily implies inequality.[36]

The Japanese "nonlitigious ethos," implying that recourse to courts for dispute resolution is selfish and against Japanese cultural norms, is another cultural difference between Japan and the United States.[37] These beliefs and attitudes explain why there are fewer lawsuits in Ja-

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31. *Id.* at 174-79. The "rules" of *giri* are social rules of conduct, of a nonlegal nature. *Id.* at 174.

32. *Id.* at 175.

33. *Id.* A person must fulfill *giri* voluntarily. If that person does not satisfy *giri*, he or she is seriously dishonored. *Id.* The beneficiaries of *giri*, however, cannot influence the first party without violating their own *giri*. *Id.*

34. *See id.* at 174-79 (listing the characteristics of *giri*). The idea of "losing face," or not being able to look the world in the face because of a feeling of shame for having violated one's personal honor, is a very important part of *giri* and of Japanese society in general. *Id.* at 178. In a well-known book about Japanese culture, Ruth Benedict describes two types of civilizations: "shame culture" and "guilt culture." R. BENEDICT, THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE 222-23 (1947), *reprinted in* YOSHIYUKI NODA, *supra* note 29, at 179 n.70. The "guilt culture" relies on an internalized conception of sin, while the "shame culture" relies on external sanctions for bad behavior. *Id.* The shame comes from outside criticism of one's behavior. *See id.* (giving a more detailed discussion of the concept of *giri*).

35. YOSHIYUKI NODA, *supra* note 29, at 159.

36. *Id.* at 179. Enforcement of subjective rights causes duties under *giri* to lose their existing emotional force. *Id.*

37. Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 607 (1985).

pan than in the United States.[38] This ethos also illustrates the traditional Japanese perception of Japanese society as exceptionally consensual and harmonious.[39]

2. *Institutional Barriers*

Institutional barriers within Japanese legal institutions also explain the Japanese person's aversion to using the court system to resolve conflicts.[40] These institutional barriers include the lack of a remedy similar to class actions in the United States[41] and ineffective discovery procedures.[42] Institutional barriers such as the limited number of attorneys,[43] high fee structures,[44] and a shortage of judges[45] also decrease the number of lawsuits in Japan.

3. *Japanese Attorneys and Legal Professionals*

In 1986, Japan had approximately 12,840 *bengoshi*,[46] or practicing

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38. *Id.* at 607; *see id.* at 607-09 (discussing why the Japanese culture favors nonlitigation, and how this relates to institutional barriers to antitrust litigation in Japan). *See generally* Mayer, *Japan: Behind the Myth of Japanese Justice*, AM. LAW., July-Aug. 1984, at 113 (discussing the cultural and institutional barriers in the Japanese system of adjudication).

39. Ramseyer, *supra* note 37, at 637.

40. *Id.* at 631-34 (discussing institutional barriers to litigation).

41. *Id.* at 631. The Japanese civil procedure code does not permit class actions, although it does allow representative plaintiffs to litigate common issues. *Id.* Such decisions, however, bind only those defendants who have agreed to be bound. *Id.*

42. *Id.* at 630-31. There are few effective means of civil discovery either before or during trial, therefore defendants who control access to information have a significant advantage. *Id.* at 631-32.

43. *Id.* at 632. The government has placed limits on the number of individuals permitted to practice law. *See infra* notes 49-50 (discussing the relatively low number of practicing attorneys in Japan).

44. Ramseyer, *supra* note 37, at 632. Most attorneys live in metropolitan Tokyo or Osaka. *Id.* Attorneys are thus unavailable to most people outside of those cities, and the cost of legal services is very high. *Id.* at 632-33. Many Japanese attorneys use a retainer fee. *Id.* at 633. The retainer is based on the amount in controversy in the lawsuit. *Id.*

45. *See id.* at 633-34 & nn.177-79 (noting that in 1977, Japan had less than 2,000 judges of general jurisdiction, compared to more than 600 federal and 6,000 state judges in the United States). The Japanese judicial system creates further delays because, unlike the system in the United States, Japanese civil procedure entitles civil litigants to a trial *de novo* on appeal, with new evidence, and a full review of issues at the Supreme Court. *Id.*

46. Shapiro, *Reclaiming a Place*, *supra* note 27, at 12, col. 1, *cited in* Kanter, *supra* note 11, at 350 n.34. "*Bengoshi*" is the Japanese term that describes the closest Japanese equivalent of the "attorney" or "lawyer" in the United States. Kanter, *supra* note 11, at 350. According to one author, the term resulted from an attempt to translate the English term "barrister" into Japanese. *Id.* "*Bengo-suru*," meaning to defend or speak for a third person, was joined with "*shi*," meaning samurai or gentleman,

attorneys.[47] The legal profession in the United States, in comparison, had over 653,600 members.[48] On a per capita basis, Japan has fewer attorneys than the United States.[49] Comparing the number of attorneys in the United States with the number of *bengoshi* in Japan, however, can be misleading.[50] Part of the explanation for the fewer number of attorneys in Japan is that only a limited number of people can study to become a *bengoshi*.[51] Furthermore, Japanese paraprofessionals handle tasks that attorneys in the United States typically perform.[52]

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creating the term "*bengoshi*." *Id.*

47. Kanter, *supra* note 11, at 350.

48. *Id.*

49. Michaud, *Correcting a Popular Misconception about the Legal Profession in Japan*, N.Y. ST. B.J., Apr.-May 1986, at 26 (stating that in 1986 Japan had 11,000 attorneys for a population of over 120 million or one attorney for every 10,000 people, while the United States had over 400,000 attorneys for a population of 235 million or one attorney for every 500 persons).

50. *See id.* (noting that it is impossible to get an accurate impression of the size of the Japanese legal profession by counting only the number of lawyers). In his 1983 report to the Harvard Board of Overseers, President Derek Bok of Harvard University made a lawyer-per-capita comparison between the United States and Japan. *Id.* Bok reported that the United States suffers from too many exceptionally talented people entering the legal profession. *Id.* Implicit in his report was the idea that the United States could benefit from following the Japanese example of limiting the number of individuals permitted to become lawyers. *Id.*

51. *See* Hahn, *An Overview of the Japanese Legal System*, 5 NW. J. INT'L L. & BUS. 517, 522 (1983) (noting that Japan has so few attorneys because there is only one law school in Japan). The Legal Training and Research Institute, or *Shihō Kenshushō*, located in Tokyo, accepts approximately 500 applicants per year. *Id.* at 522-23. Under Article 4 of the *Bengoshi Hō*, one must graduate from the Institute before he or she is admitted to practice law in Japan as a *bengoshi*. *Id.* at 524 & n.38. The Institute accepts less than two percent of the people who apply for admission and take the entrance examination. *Id.* If admitted to the Institute, a candidate then studies for two years as a *shihō shushu-sei* (legal apprentice), and then must pass a second examination. *See id.* (commenting that although the Institute gives a second test before an apprentice graduates from the Institute, students rarely fail, and those who do fail may retake the examination after an additional year of study). The Ministry of Justice considers the students employees of the Ministry, and pays them a salary during their studies at the Institute. *Id.* at 522.

52. *Id.* at 530; *see also* Brown, *A Lawyer By Any Other Name: Legal Advisors in Japan*, in DOING BUSINESS IN JAPAN (1983) (discussing a statistical study of the various types of legal professionals in Japan), *cited in* Michaud, *supra* note 49, at 26-28.

There are many other types of legal professionals who are not *bengoshi*, but who perform work an attorney in the United States normally performs. First, legal specialists in the government bureaucracy perform many functions of attorneys in the United States. Michaud, *supra* note 49, at 28. They usually have undergraduate law degrees. *Id.* They are responsible for drafting legislation for the Diet, as well as the rules and regulations needed to interpret those laws. *Id.* There are approximately 2,000 civil servants working as legal specialists. *Id.*

Second, the Japanese *sōgō shōsha*, or trading companies, employ in-house legal advisors. *Id.* The in-house legal advisors, like the government legal specialists, usually have undergraduate degrees in law. *Id.* The in-house legal advisors perform all legal work for the company other than litigation. *Id.* The trading companies must rely on in-house

The attorney plays a different and smaller role in Japanese life than in American life. For example, in the United States the attorney is an important actor in contract negotiations.[53] A client in the United States relies on the attorney's talents not only for drafting contracts, but also for providing advice and counseling on business matters.[54] The attorney

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legal advisors because they cannot employ *bengoshi* without special permission from the Japanese bar association. *Id.* at 28 n.2. There are approximately 6,000 in-house legal advisors. *Id.* at 28.

Third, *shihō shoshi* are judicial scriveners who draft court documents, take the necessary actions relating to title transfer for land, and give legal advice on related matters, similar to attorneys in the United States. SHIHŌ-SHOSHI HŌ (Judicial Scriveners Act) (1950 c. 197), art. 1(1), *cited in* THE JAPANESE LEGAL SYSTEM, *supra* note 1, at 563 & n.1. The office of the Ministry of Justice in the location where the candidate wants to practice administers an examination for people who wish to become *shihō shoshi*. *Id.* Candidates for the job of *shihō shoshi* then are nominated from among those who have served for more than five years as clerks of courts or as administrative officers in the courts, in the Ministry of Justice or public procurators' offices. *Id.* People with equivalent learning and ability as clerks and administrative officers mentioned above are also nominated. *Id.* at 563. There were approximately 15,000 people in 1982 who acted primarily as *shihō shoshi*. Michaud, *supra* note 49, at 28 & n.3 (noting that there are over 30,000 people qualified as *shihō shoshi*, but that this figure includes individuals qualified in other legal professions).

Fourth, *benrishi* are similar to United States patent attorneys and have the power to give legal advice on patent, trademark, and trade name work. BENRISHI HŌ (Patent Attorneys Act) (1921 c. 100), art. 1, *cited in* THE JAPANESE LEGAL SYSTEM, *supra* note 1, at 564 & n.4. The law permits *benrishi* to represent clients in court on patent and trademark matters. BENRISHI HŌ (Patent Attorneys Act) (1921 c. 100), art. 9.2, *cited in* THE JAPANESE LEGAL SYSTEM, *supra* note 1, at 564 & n.5. In 1982, there were approximately 2,500 *benrishi*. Michaud, *supra* note 49, at 28.

Fifth, *zeirishi* are tax attorneys who can give legal advice on tax matters and represent clients before the Tax Office. Hahn, *supra* note 51, at 530. They cannot, however, represent clients in actions brought in ordinary court. ZEIRISHI HŌ (Tax Attorneys Act) (1951 c. 237), art. 2, *cited in* THE JAPANESE LEGAL SYSTEM, *supra* note 1, at 564 & n.8. *Zeirishi* must pass a difficult five-part examination. Michaud, *supra* note 49, at 28. Certified public accountants and *bengoshi* qualify *ipso facto* as *zeirishi*. ZEIRISHI HŌ (Tax Attorneys Act) (1951 c. 237) art. 3, *cited in* THE JAPANESE LEGAL SYSTEM, *supra* note 1, at 564 n.9. In general, the three professions are distinct. Michaud, *supra* note 49, at 28. There were about 35,000 *zeirishi* (not including *bengoshi* and certified public accountants) in 1982. *Id.*

Sixth, *gyosei shoshi* specialize in preparing and recording nonjudicial documents filed with the government, a task attorneys in the United States often perform. *Id.* Instead of a national examination, individuals take an exam in the local prefecture. *Id.* There were approximately 16,000 people in Japan acting primarily as *gyosei shoshi* in 1982. *Id.*

Finally, law professors represent another distinct group of legal professionals. In Japan, professors rarely practice as *bengoshi*. *Id.* They are, however, often asked to render opinions on legal matters, particularly in the area of litigation, as are their counterparts in the United States. *Id.* Japan had approximately 2,500 law professors in 1982. *Id.*

53. *See* Hahn, *supra* note 51, at 532 (comparing the role of an attorney in business deals in the United States with his or her Japanese counterpart).

54. *Id.* Attorneys in the United States not only handle lawsuits, but also use their verbal and analytical training to counsel their clients on business negotiations and deci-

in the United States must often find creative answers to a client's problems.[55]

The *bengoshi*, in contrast, assumes a more limited role in Japanese business life.[56] The *bengoshi* specializes in litigation,[57] unlike attorneys in the United States. Therefore, Japanese clients generally do not hire *bengoshi* to provide business counselling, representation in contract negotiations, or other similar business services.[58] In Japan, parties to a business transaction often perceive an attorney's participation as an unfriendly action.[59] In contract negotiations, the *bengoshi* normally does not participate in the preliminary negotiation process.[60] Instead of employing a *bengoshi*, Japanese companies use their corporate legal departments.[61] The members of these legal departments are the negotiators, drafters, and advisors during contract negotiations.[62] A *bengoshi* becomes involved in a contract, if at all, only after the parties have completed their negotiations, and then only to review the work.[63]

B. TREATMENT OF FOREIGN ATTORNEYS IN THE UNITED STATES AND IN JAPAN

Every nation has a legitimate interest in exercising some control over individuals providing legal services within its territory.[64] Specially qual-

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sions. *Id.*

55. *Id.*

56. *Id.*

57. *See* Higuchi, *Gaikoku Bengoshi Mondai (The Foreign Lawyers Problem)*, 842 JURISUTO 56 (1985) (noting that courtroom litigation constitutes 70 to 85 percent of a *bengoshi*'s work), *cited in* Kanter, *supra* note 11, at 350 n.34.

58. Hahn, *supra* note 51, at 532. The *bengoshi*, like the English barrister, normally handles litigation matters, while the Japanese corporate law departments, like the English solicitors, handle day-to-day contract negotiation and drafting. *Id.* at 532.

59. Mayer, *supra* note 38, at 115 (quoting *bengoshi* Kunio Hamada as saying "[l]awyers are considered undertakers" and "the mere presence of a lawyer in a business transaction is an unfriendly action").

60. Hahn, *supra* note 51, at 531. An attorney from the United States negotiating a contract with a Japanese company will deal with a member of the legal department of the company, rather than with a *bengoshi*. *Id.*

61. *Id.*; *see also* Kanter, *supra* note 11, at 351 (explaining that corporate legal departments consist of people with undergraduate law degrees); *see supra* note 52 (describing the in-house legal department of the *sōgō shōsha*).

62. Hahn, *supra* note 51, at 531-32; Kanter, *supra* note 11, at 351.

63. Hahn, *supra* note 51, at 531-32. The attorney may act as an "advising attorney" to review the contract. *Id.* at 531. If the section chief of the corporate legal department has already approved the language of a contract, the attorney's power to redraft is even more limited. *Id.* at 532.

64. Comment, *Providing Legal Services*, *supra* note 24, at 1789-812 (discussing how the needs of attorneys in the United States who desire to play a major role in providing international legal services in foreign countries often conflicts with the interests of the foreign nation in restricting such activity). There are five risks that nations

ified individuals often enjoy a monopoly on the legal profession.[65] In addition, domestic practitioners have an ethical obligation to maintain the integrity of the profession and to prevent competition from individuals who are not qualified to practice law.[66] In the United States, local governments establish minimum qualifications to practice law, ethical considerations, and standards for the breadth of permissible activities.[67]

1. Foreign Attorneys in the United States

An attorney can practice law in the United States only after passing the bar examination of a particular state. Passing the examination, however, does not automatically grant an attorney the right to practice law in another country or even in a state other than the one whose bar examination he or she passed.[68] As a general rule, state bar associations restrict attorneys from other countries from practicing law.[69] At the time of the Section 301 Petition, with the exception of New York[70]

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have used to justify exclusion: (1) the person from outside the jurisdiction lacks loyalty to the political and cultural values of the nation, thus disrupting the administration of justice; (2) the lawyers from the United States do not have the competence to serve the local citizens; (3) the local citizens do not have redress for possible injury that attorneys from the United States might cause; (4) the attorneys from the United States will interfere with the development and ability to compete of the local legal profession, thereby damaging the local legal profession; and (5) reciprocal privileges in the United States are not likely. *Id.* at 1788-89.

65. *Id.*

66. *Id.* at 1770 n.15. A foreign attorney confronts the state's interests in (1) protecting the public; (2) maintaining national standards of court integrity; and (3) satisfying members of the legal profession that they will not lose business to foreign attorneys. *Id.*

67. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (recognizing the interest of a state in regulating the practice of law within its boundaries, and the broad powers of a state to establish standards for the licensing of legal practitioners); *In re* Griffiths, 413 U.S. 717, 722-23 (1973) (holding that a state has a substantive interest in determining whether an applicant to the bar possesses the character required of an attorney); Schware v. Board of Bar Examiners, 350 U.S. 232, 239 (1957) (acknowledging that a state can require various standards of qualification before it admits an applicant to the bar); *cf.* S. CONE, REGULATION OF FOREIGN LAWYERS 42-107 (3d ed. 1984) (analyzing the regulations governing attorneys from the United States practicing law in Australia, Brazil, Canada, China, England, Federal Republic of Germany, France, Hong Kong, Israel, Italy, Japan, Mexico, Netherlands, Nigeria, Singapore, and the European Community).

68. Comment, *Providing Legal Services*, *supra* note 24, at 1772.

69. *Id.* at 1784.

70. *See* N.Y. JUD. LAW § 53.6 (McKinney 1983) (allowing foreign lawyers to practice as "foreign legal consultants" without taking the New York bar examination or attending a law school in the United States); *see also* 22 N.Y. ADMIN. CODE tit. 22, § 521.1(a) (1986) (permitting the licensing of applicants who are attorneys, or the equivalent, in foreign countries, and who have practiced, and have been in good standing for at least five of the immediately preceding seven years). The legal consultant may engage in a consulting practice, but may not prepare documents that affect (1)

and the District of Columbia,[71] foreign attorneys could not practice law in the United States without first taking and passing a state bar examination.[72]

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title to real estate in the United States, (2) disposition upon death of property located in the United States that a resident of the United States owns, (3) administration of a decedent's estate in the United States, or (4) the marital relations of, or custody of a child of, a resident of the United States. *Id.* at §§ 521.3(b)-(d). The foreign legal consultant may give advice on United States law only if the foreign legal consultant bases the advice on the opinion of an attorney from the United States. *Id.* at § 521.3(g); *see also id.* at §§ 520.9(a)-(d) (giving the New York courts the discretion to admit to the New York bar without examination, foreign attorneys who were educated in a country whose legal system is based on English common law, who have practiced and have been in good standing for at least five of the immediately preceding seven years, and who meet "other tests of character and fitness" as the courts may impose).

The demand for legal services from foreign attorneys is probably high in New York because international finance is a predominant business in New York City. Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 AM. J. COMP. L. 678, 687 (1979). The need for foreign attorneys in New York prompted New York to change its bar regulations. *Id.* at 688. A second motivating consideration was the desire to suspend criticism of the activities of attorneys from the United States practicing in foreign countries. At the time it enacted its new regulations, New York studied the changes to its regulations on the activities of foreign lawyers that France made in 1971. *Id.* at 687-88. The legislative history of the French statute indicates a goal of the legislation was to quiet French attorneys' criticism of foreign attorneys. *Id.* at 688.

71. DIST. LAW., May-June 1986, at 16-17. The District of Columbia Court of Appeals adopted an amendment to Rule 46 of the District of Columbia Court of Appeals Rules in March 1986 that permits licensing foreign attorneys as special legal consultants. *Id.* The District of Columbia modeled its regulations after the New York rules. *Id.*

The District of Columbia provisions allow "Special Legal Consultants" to practice law on a limited basis, primarily on foreign and international law and transactions, but the provisions do not allow these consultants to appear in court or prepare real estate documents, wills, trust agreements, or domestic relations documents. *See* D.C. CT. APP. R. 46(c)(4)(D) (describing the scope of practice of a "Special Legal Consultant"), *reprinted in* 26 I.L.M. 986, 989 (1987). The District of Columbia does not permit "Special Legal Consultants" to give advice on United States law, unless the Consultants have relied on the advice of an attorney licensed to practice in the United States. *Id.* The District of Columbia rules, unlike the New York rules, contain a reciprocity provision that would allow a foreign country to license attorneys from the United States. *See* D.C. CT. APP. R. 46(c)(4)(C) (noting that the court, in ruling on an application for "Special Legal Consultant" status, may consider whether a member of the District of Columbia bar could establish an office in the country where the prospective applicant was admitted to the bar), *reprinted in* 26 I.L.M. 986, 989 (1987).

72. *See* S. CONE, *supra* note 67, at 5-40 (analyzing the laws of a number of jurisdictions in the United States regulating foreign attorneys who want to practice law in the United States). Several states have provisions allowing either foreign attorneys or "resident aliens" to apply for admission to the state bar or to take the state bar examination. *Id.*

In California, practitioners from English common law jurisdictions do not have to meet the California requirement of completing the first year law school examinations successfully, but they must pass the bar examination. *See* CAL. BUS. & PROF. CODE §§ 6060(g), 6062, foll. § 6069, Rules IV §§ 42(a)(3), 44(a) (West 1974 & Supp. 1987), *cited in* S. CONE, *supra* note 67, at 5-9. If an applicant studies four years at a law school "that is authorized to confer professional degrees and requires classroom attend-

Prior to the 1973 Supreme Court decision in *In re Griffiths*,[73] state bar associations could prohibit aliens from taking the bar examination. The Court in *In re Griffiths* did not state explicitly that an alien attorney could offer legal services in the United States, even if the services are related strictly to the alien attorney's home country, but such an interpretation is desirable.[74] State bar associations should allow alien attorneys to offer legal services related strictly to the alien attorney's

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ance of its students for a minimum of 270 hours a year," he or she satisfies the legal education requirement for admission to the California bar. *Id.* at § 6060(e), *cited in* S. CONE, *supra* note 67, at 6.

In Connecticut, "an alien lawfully residing in the United States" can apply for admission to the Connecticut bar. *See* CONNECTICUT PRACTICE BOOK § 16 (First) (West 1979 & Supp. 1987), *cited in* S. CONE, *supra* note 67, at 10. The alien must also meet additional requirements for admission to the Connecticut bar, which include education at an institution the Bar Examining Committee has approved and passing the bar examination, or having "actually practiced" law in another United States jurisdiction for at least five years. *See id.* at §§ 16 (Fifth), 21, *cited in* S. CONE, *supra* note 67, at 10-11.

The Massachusetts Board of Bar Examiners can admit, without examination, a foreign lawyer who has practiced or taught law for at least five years. Massachusetts Board of Bar Examiners, Information Relating to Admission of Attorneys in Massachusetts § 6.2 (1983), *cited in* S. CONE, *supra* note 67, at 22. *But see* S. CONE, *supra* note 67, at 22 n.4 (noting that the Massachusetts Board of Bar Examiners required a foreign-educated attorney not admitted in any other state in the United States to obtain a juris doctor degree from an ABA-approved law school).

New Jersey permits foreign applicants to take the bar examination after they have met educational requirements and established that they have good standing in every other jurisdiction in which they were ever admitted to practice law. *See* RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, Rule 1:24-2 (1987), *cited in* S. CONE, *supra* note 67, at 23-24.

Ohio allows foreign-educated attorneys to take the Ohio bar examination if the Ohio Supreme Court approves the attorney's educational qualifications. OHIO RULES OF COURT, Rule I, §§ 2(A)(g), 9(A)(k) (1984), *cited in* S. CONE, *supra* note 67, at 33.

Pennsylvania allows a foreign-educated attorney to take the bar examination after attending a law school in the United States for one year. PA. R. CT., Bar Admission Rule 203, 205, *cited in* S. CONE, *supra* note 67, at 34-35.

In Texas, the Board of Law Examiners has discretionary authority to permit a "resident alien" to take the bar examination. TEX. R. CT., Rules Governing Admission to the Bar of Texas, Rule VIII, *cited in* S. CONE, *supra* note 67, at 38-40.

The Supreme Court of Florida previously permitted applicants to petition for waiver of the Florida statute on bar admissions. FLA. STAT. Admission to Bar, art. 3, § 1(b), *cited in* S. CONE, *supra* note 67, at 15. It no longer approves such petitions. *See In re* Hale, 433 So. 2d 969, 972 (Fla. 1983) (stating that the decision not to consider waivers of the requirement in Florida that lawyers be graduates of ABA-approved, ABA-provisionally approved, or AALS member law schools was in the best interests of the legal profession).

New York permits foreign lawyers to practice as "foreign legal consultants." *See supra* note 70 (discussing the New York regulations).

The District of Columbia recently revised its bar regulations. *See supra* note 71 (discussing the revisions to the District of Columbia regulations permitting foreign attorneys to practice as "Special Legal Consultants").

73. *In re* Griffiths, 413 U.S. 717 (1973).

74. Kosugi, *supra* note 70, at 687.

home country, because attorneys from the United States want to provide similar legal services in foreign countries. At the time of the Section 301 Petition, Hawaii, California, and Michigan were considering changing their state bar regulations to allow foreign attorneys to practice in this limited manner.[75]

2. *Foreign Attorneys in Japan*

Many foreign attorneys went to Japan after World War II, to address legal matters connected with the Allied occupation of Japan.[76] Some of the attorneys who were in Japan to take part in the International Military Affairs Trials[77] began to handle legal matters not directly connected with the Allied occupation.[78] Responding in part to this influx of foreign attorneys, the Japanese government enacted the *Bengoshi Hō* in 1949.[79]

a. *The Bengoshi Hō*

For a country that is normally reluctant to welcome foreigners, the Japanese government expressed a broad international viewpoint and took an extremely open approach in the *Bengoshi Hō*.[80] The *Bengoshi Hō* eliminated the long existing requirement of Japanese nationality as a prerequisite to qualifying as an attorney.[81] Furthermore, article 7 specifically permitted foreign attorneys who were not admitted to the Japanese bar to handle legal matters.[82] The foreign attorneys who

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75. *See* Section 301 Petition, *supra* note 3, at 40 (listing the United States jurisdictions that, at the time of the petition, were considering revising their regulations to allow foreign attorneys to act as "foreign legal consultants," patterned after the New York and District of Columbia regulations); *see also infra* note 225 (discussing the changes Hawaii, California, and Michigan made, after the new Japanese law went into effect, to allow foreign attorneys to practice as foreign legal consultants).

76. Kosugi, *supra* note 70, at 691.

77. *Id.*

78. *Id.* In part, the postwar dependence of Japan on foreign countries, especially the United States, resulted in the presence of the foreign attorneys. *Id.*

79. *Id.* at 691-92.

80. Fukuhara, *supra* note 1, at 595.

81. *Id.* Eliminating the nationality requirement permitted an alien to practice as a Japanese attorney if the alien met the other requirements to be an attorney. *Id.* The alien attorney still had to pass the national "legal examination," or *shihō shiken*, before Japan would recognize him or her as a *bengoshi*. *See id.* at 595-96 (noting that retention of the nationality requirement would have made it impossible for an alien to become a *bengoshi*).

82. BENGOSHI HŌ, *supra* note 1, art. 7. Article 7 stated:

> (1) A person who is qualified to become an attorney of a foreign country and who possesses an adequate knowledge of the laws of Japan may obtain the recognition of the Supreme Court and conduct the affairs prescribed in Article 3 [the

could practice under the provisions of article 7 were called *junkai-in.*[83]

b. *The Repeal of Article 7*

On August 10, 1955, the Japanese legislature repealed article 7.[84] The repealing legislation did not state explicitly why the legislature repealed article 7.[85] The repealing statute contained a grandfather clause, however, that permitted attorneys previously qualified to practice law under article 7 to continue to practice law.[86] The repeal of article 7

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affairs of an attorney]; Provided, however, that this does not apply to the persons listed in the prior article [persons disqualified for various reasons such as disciplinary action by a practicing attorneys' association, bankruptcy, and being sentenced to punishment by imprisonment or greater].

(2) A person who is qualified to become an attorney of a foreign country may obtain the recognition of the Supreme Court and conduct the affairs prescribed in Article 3 in regard to aliens or foreign law; Provided, however, that this does not apply to the persons listed in the prior article.

(3) The Supreme Court may impose an examination or screening in those cases where it grants the recognition of the prior two paragraphs. . . .

Id. art. 7.

83. Kosugi, *supra* note 70, at 691. Pursuant to article 7, the Supreme Court of Japan enacted regulations pertaining to foreign attorneys, under the Supreme Court Regulation No. 22 of 1 September 1949. *Id.* at 692 & n.32. Article 48, part 1 of the Rules of the Japan Federation of Bar Associations classified foreign attorneys entitled to practice in Japan under article 7 as *junkai-in. Id.* at 692. Article 48, part 2 regulated the *junkai-in. Id.*

84. Section 301 Petition, *supra* note 3, at 23; Fukuhara, *supra* note 1, at 596-97. The repealing statute was Law No. 155 of 1955. Kosugi, *supra* note 70, at 692 n.33.

85. *See* Fukuhara, *supra* note 1, at 597. The bill stated that "it is necessary [for Japan, after the enforcement of the Peace Treaty,] to be properly recognized as an independent state on the one hand, while taking an international view on the other hand." *Id.* During the debate, however, the proponent of the bill stated there was no need for a special exception for foreign attorneys because aliens could become *bengoshi* if they passed the national examination. *Id.* No other country had a similar exception. *Id. But see* Fukuhara, *supra* note 1, at 597 n.18 (noting that the authors of the amendment appeared to have made this assertion without researching the subject). *See id.* (listing other countries, such as the Republic of China, England, The Republic of Korea, and several states that at the time had special provisions for regulating foreign attorneys who practiced law).

In addition, the Supreme Court of Japan decided in November 1955 to make Japanese citizenship a prerequisite for admission to the *Shihō Kenshushō* (Legal Training and Research Institute). Kosugi, *supra* note 70, at 689-90. The court reasoned that because the students at the Institute received a salary as "employees" of the Ministry of Justice, the government should treat the students as public servants. *Id.* The Supreme Court of Japan passed a resolution amending the requirements for admission to the Institute on September 21, 1977, effective January 1, 1978. *Id.* at 690. The resolution stated that "[f]oreigners may be admitted to the Legal Institute in an appropriate instance." *Id.* Arguably, this resolution made it possible for foreigners to gain admittance to the Institute on a case-by-case basis. *Id.* at 690-91.

86. Fukuhara, *supra* note 1, at 598. Japan permitted the foreign attorneys licensed to practice prior to August 10, 1955 to continue practicing under the prior regulations, as long as they lived in Japan. Kosugi, *supra* note 70, at 692.

meant that the eligible foreign attorneys had a monopoly among foreigners on the international practice of law in Japan.[87] These few attorneys enjoyed a privileged position because Japanese law protected them from foreign competition.[88] Thus, Japanese law effectively precluded other foreign attorneys and those Japanese attorneys who wanted a more international scope of practice from competing with this select group of attorneys.[89]

In addition to those foreign attorneys practicing as *junkai-in*, Japanese law firms employed many foreign attorneys as legal trainees.[90] Both the law firms and the foreigners, however, usually found this experience unsatisfying.[91] The foreign attorneys, many of whom speak Japanese, knew that they could not practice in Japan independently.[92] Many trainees wanted to learn about Japanese domestic law, but instead found themselves merely drafting Japanese documents into English and assisting with international trade issues.[93]

The Japanese argued that supervising the trainees was important because the trainee attorneys, many of whom come to Japan immediately after completing law school, often lacked experience and training in their home countries.[94] The Japanese attorneys became concerned that

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87. *See* Fukuhara, *supra* note 1, at 598 n.19 (noting that there is no other example of the Japanese legislature granting such a valuable economic privilege to a limited group of people through the recognition of their vested right); *see also* Kosugi, *supra* note 70, at 692-93 (pointing out that so-called "foreign trade legal activities" were outside the realm of a *bengoshi*'s work, and that the *junkai-in* thus filled a gap in the Japanese legal profession during the postwar period).

88. Kosugi, *supra* note 70, at 692-93. The *bengoshi* criticize the *junkai-in*, the foreign attorneys who continue to practice in Japan under the repealed article 7 provisions, for ignoring article 5(2) of the *Bengoshi Hō*, which states that the Supreme Court of Japan prescribes the scope of the foreign attorneys' activities. *See id.* at 693 (citing Kodama, *Nihon ni Okeru Gaikokujin Bengoshi no Shomondai (Problems Concerning Foreign Lawyers in Japan)*, 427 JURIST 67 (1969) *and* Senoo, *Zainichi Gaikokujin no Jittai (The Situation of Foreign Lawyers in Japan)*, 309 JURIST 70 (1964)). The *bengoshi* also criticize the *junkai-in* for practicing the law of other countries, including Japanese law. *Id.* One could see the repeal of article 7 as helping Japanese attorneys who want to practice in the field of international trade because it prevented an influx of foreign attorneys. Kosugi, *supra* note 70, at 693. Realistically, however, a Japanese attorney requiring assistance on a question of foreign law would prefer to seek the advice of a foreign attorney who is more knowledgeable. *Id.* at 696-97. Because the *junkai-in* are the only professionals qualified to give such advice, they maintain a competitive advantage in the area of international transactions.

89. Kosugi, *supra* note 70, at 696-97.

90. Hahn, *supra* note 51, at 538. A Japanese lawyer usually supervises the work because the foreigners themselves cannot practice law. *Id.* These internships normally last two years. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Kosugi, *supra* note 70, at 694.

these foreign trainees were engaged in substantive legal work associated with international transactions, either because the supervising Japanese attorney could not speak English well or was too busy to supervise the trainees adequately.[95] The Japanese attorneys expected these trainees to handle international trade matters to a limited extent.[96] The problem, however, involved the content of the work these foreign trainees performed.

c. *The Interpretation of Article 72 of the Bengoshi Hō*

Article 72 of the *Bengoshi Hō* prohibits aliens from engaging in certain activities that would constitute the unauthorized practice of law.[97] The interpretation of article 72 was a critical matter in the dispute over whether foreign attorneys should practice law in Japan. Article 72 prohibits unauthorized persons from handling matters that have become or are likely to become a *jiken*, or case.[98] Under article 77, violators of article 72 may face criminal sanctions.[99]

The Supreme Court of Japan, however, declared that articles 72 and 77 do not cover all legal business that nonlawyers perform.[100] Argua-

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95. *Id.*

96. *Id.* at 693.

97. BENGOSHI HŌ, Law No. 205 of 1949, art. 72, *reprinted in* THE JAPANESE LEGAL SYSTEM, *supra* note 1, at 614. Article 72 states:

> No person other than a practicing attorney shall, with the aim of obtaining compensation, perform legal business such as presentation of legal opinion, representation, mediation or conciliation and the like in connection with lawsuits or non-contentious matters, and objections to dispositions made by administrative offices in such forms as request for investigation, motion of objection, request for review as well as other general legal business, or act as an intermediary therefor; Provided that this shall not apply in such cases as otherwise provided for in this Act.

Id.

98. Fukuhara, *supra* note 1, at 602.

99. *Id.* The punishment is imprisonment with labor for a maximum of two years and a maximum fine of 50,000 yen. BENGOSHI HŌ, Law No. 205 of 1949, art. 77, *cited in* Fukuhara, *supra* note 1, at 602.

100. Kosugi, *supra* note 70, at 695. Some authors argue that the Supreme Court of Japan is willing to limit the scope of article 72:

> Concerning the purpose of [Article 72], a *bengoshi* is bound to protect fundamental human rights and bring about social justice, and to engage in a wide range of legal services. For that reason, the Bengoshi Act prescribes strict qualification requirements, and requires submission to necessary regulation for honest and upright behavior. . . . In this world, it is not unknown that persons without any license, and who have not submitted to any regulation, engage in the business of interfering in the legal matters of others indiscriminately, for their own profit. If this were left alone, it would harm the interests of the parties and other persons, and would obstruct the smooth functioning and justice of legal life and harm the legal order. Therefore, we believe this Article was enacted to prohibit this kind of conduct. However, to prevent these kinds of abuses, *it is sufficient to regulate that conduct which involves repeated indiscriminate interference with*

bly, as long as the client in the United States handles the final details of a contract or form submission, nothing in the regulations prevents a foreign practitioner from submitting a *draft* contract or form to the government.[101] The provisions of article 72, therefore, appear to permit alien attorneys to engage in a limited scope of activities.

In 1972, however, the *Nihon Bengoshi Rengokai's* (*Nichibenren*)[102] *Gaikoku Bengoshi Taisaku Iinkai* (Japanese Federation of Bar Association's Committee to Oppose Foreign Lawyers),[103] published its *Gaikokujin Hiben Katsudo Boshi ni Kansuru Kijun* (Standards Concerning the Prevention of Non-Attorney Activities by Foreigners).[104] This document enumerated the activities that the *Nichibenren* believed the *Bengoshi Hō* should prohibit or restrict foreign attorneys from performing, and classified all aliens who were not allowed to practice law in Japan as "unqualified aliens."[105] In summary, the standards said: (1) a Japanese attorney or a foreign attorney recognized under former article 7 of the Practicing Attorneys Act must direct or supervise activities such as the drafting and rewording of the text of technical assistance and joint venture contracts; (2) an unqualified alien may not express independently a legal opinion on matters such as the drafting or revision of a contract because the attorneys would consider such an act the rendering of legal advice; and (3) an unqualified alien may not give independent legal advice or meet independently with a client to provide legal consultation or to express a legal opinion.[106]

Critics of these "standards" have noted several inconsistencies. For

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the legal affairs in the legal matters of others for the purpose of private gain. Kato v. Japan, 25 *Keishū* (Saikō Saibansho) (No. 5) 690, 265 HANTA 92, 93 (1971), *reprinted in* Kanter, *supra* note 11, at 363 (emphasis in original); *see also* Kosugi, *supra* note 70, at 695 & n.40, and 696 (arguing that it is wrong to accept blindly the idea that article 72 gives *bengoshi* a monopoly on the conduct of legal business). This opinion appears to say that the purpose of article 72 is solely to protect the citizenry from unlicensed or unqualified personnel offering legal services. Kanter, *supra* note 11, at 363-64.

The author of the original provisions of article 72 interprets the article as allowing a foreign attorney to handle local affairs that are not *jiken*, if such action would not violate some other regulation. Fukuhara, *supra* note 1, at 602-03.

101. Fukuhara, *supra* note 1, at 605; *see supra* note 97 (quoting the text of article 72).

102. The *Nihon Bengoshi Rengokai*, or *Nichibenren*, (Japanese Federation of Bar Associations), is the Japanese equivalent of the American Bar Association. Article 45 of the *Bengoshi Hō* created the *Nichibenren* to regulate *bengoshi*. Kanter, *supra* note 11, at 352 n.51.

103. Fukuhara, *supra* note 1, at 607 n.43. This eight-person committee consists of attorneys who are concerned about the activities of foreign attorneys in Japan. *Id.*

104. *Id.* at 606; Section 301 Petition, *supra* note 3, at 25.

105. Fukuhara, *supra* note 1, at 606.

106. *Id.*

example, the standards do not distinguish between legal services and nonlegal services, or between legal services and legal matters.[107] Furthermore, the standards do not consider the wording of the prohibition in article 72 of the *Bengoshi Hō* regarding the unauthorized practice of law,[108] because the standards are not restricted to legal affairs involving Japanese *jiken* (cases).[109] Finally, the standards do not take into consideration the wording of article VIII of the Treaty of Friendship, Commerce, and Navigation (FCN Treaty) between Japan and the United States.[110] These standards, although not legally binding,[111] represent the opinion of the *Nichibenren.* They are important, however, because they represent the attitude of some members of the *Nichibenren* on whether to allow foreign attorneys to practice in Japan. In addition, the Japanese government has formally recognized the autonomy of the *Nichibenren* over the legal profession regarding the issue of permitting foreign attorneys to open offices in Japan.[112]

C. The "Visa Freeze"

Japan can benefit from having foreign attorneys offer legal services on foreign law matters, either directly or in conjunction with a Japanese attorney.[113] Japan, however, as a sovereign, has the right to decide whether to allow foreign attorneys to practice within its borders. Even

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107. Kanter, *supra* note 11, at 362.

108. *See supra* note 97 (giving the text of article 72).

109. Fukuhara, *supra* note 1, at 606-07.

110. FCN Treaty, *supra* note 14, art. VIII, para. 1. Article VIII of the FCN Treaty deals with the practice in each state of professionals from the other state. Article VIII(1) provides that:

> 1. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within their territories of such other Party for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises in which they have a financial interest, within such territories.

Id. Article VIII thus appears to establish grounds for allowing foreign attorneys to practice in Japan under special circumstances, such as foreign attorneys who represent United States nationals and companies.

111. Fukuhara, *supra* note 1, at 607 (noting that the jurisdiction of the *Nichibenren* is limited to the *bengoshi* only).

112. *Kore made no Keika (Chronology of Events to Date)*, Toben Shimbun, Aug. 10, 1985, at 4, *cited in* Section 301 Petition, *supra* note 3, at 32.

113. Kosugi, *supra* note 70, at 697. Kosugi adds that officials should interpret the *Bengoshi Hō* to allow such activity and should not render such activity unlawful under articles 72 and 77. *Id.*

if it permits foreign professionals to practice as attorneys, Japan still may regulate their activities.

Japan has been reluctant to allow attorneys from the United States to open offices in Japan. At the time of the Section 301 Petition, only one law firm had opened an office in Japan since the repeal of article 7 in 1955. In April 1977, the government of Japan issued a visa to Isaac Shapiro, a partner of the law firm of Milbank, Tweed, Hadley & McCloy.[114] Shapiro's visa permitted him to enter Japan under article VIII of the FCN Treaty.[115] On June 10, 1977, eighty-seven *bengoshi* filed a petition asking the *Nichibenren* to investigate Shapiro's activities.[116] The *Nichibenren* issued a formal letter of warning to Shapiro on June 17, 1977, and sent a copy of this letter to the Japanese Ministry of Justice.[117] Shapiro ignored the *Nichibenren* warning letter and proceeded to open a law office in Tokyo on July 1, 1977.[118]

The ensuing discussions between the *Nichibenren* and the Ministry of Justice led to a "visa freeze."[119] The *Nichibenren* and the Ministry of Justice began discussing the "Shapiro problem" in June 1977.[120] The *Nichibenren* originally requested that the Ministry of Justice prosecute Shapiro for the unauthorized practice of law.[121] According to the section 301 petitioners, there is indirect evidence that the *Nichibenren* agreed not to ask for Shapiro's prosecution in exchange for an agreement from the Ministry of Justice to stop issuing visas to foreign attorneys.[122] In December 1980, the Japanese government denied the visa

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114. Section 301 Petition, *supra* note 3, at 27. Shapiro opened a Tokyo office on behalf of Milbank, Tweed, Hadley & McCloy to advise the Japanese branch of Chase Manhattan Bank on the law of the United States. Hahn, *supra* note 51, at 537.

115. Section 301 Petition, *supra* note 3, at 27. According to the Section 301 Petition, Shapiro's visa says, "An expert mentioned in Article 8, Japan-U.S. Commerce and Navigation Treaty." *Id.*

116. *Id.*

117. *Id.* The *Nichibenren* warned Shapiro they would consider his opening of the Milbank Tokyo office the unauthorized practice of law under article 72. *Id.*

118. *Id.* The firm argued opening the Tokyo office would not constitute the unauthorized practice of law, because the firm's members would give advice on foreign law and not on Japanese law. Hahn, *supra* note 51, at 537.

119. *See* Section 301 Petition, *supra* note 3, at 28-30 (discussing an apparent agreement between the *Nichibenren* and the Ministry of Justice not to prosecute Shapiro in exchange for two promises: to freeze visa applications of attorneys from the United States, and not to issue an interpretation of article 72 that would be unfavorable to the *Nichibenren*). This visa freeze was one of the reasons the attorneys from the United States petitioned for relief under section 301 of the Trade Act of 1974. *Id.* at 29-31.

120. *See id.* at 28 (noting that a Ministry of Justice official involved in the matter confirmed the existence of such a dialogue).

121. *Id.*

122. *See id.* (quoting a February 2, 1982 letter from Shapiro to Shintaro Abe, who was the Minister of International Trade and Industry at the time, and who is now

application of an attorney from Milbank, Tweed, Hadley & McCloy.[123] The Japanese government claimed that it was maintaining the status quo until it could establish a policy regarding foreign attorneys.[124]

In March 1982, the United States informed the Japanese government officially that it considered the Japanese restrictions on law firms from the United States that wanted to establish offices a nontariff barrier to trade in legal services.[125] The USTR submitted a proposal in April 1985 to allow attorneys from the United States to open offices in Japan.[126] On July 30, 1985, however, the Japanese government announced its "Action Programme Concerning the Foreign Lawyers Problem," which ignored the April 1985 USTR proposal.[127] In December 1985, the *Nichibenren* adopted a resolution defining a policy for a "foreign lawyers' system."[128] The Ministry of Justice then introduced a bill in the Diet, to amend the *Bengoshi Hō* on March 28, 1986, prompting the Section 301 Petition.[129]

II. THE SECTION 301 PETITION

The attorneys from the United States who want to open offices in

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Foreign Minister). This letter noted the *Nichibenren*'s protest and stated that Shapiro understood that the presence of Milbank, Tweed, Hadley & McCloy in Japan had been accepted, but that the Ministry of Justice would not issue additional visas to foreign attorneys. *Id.* It is unclear who accepted the presence of Milbank: the Ministry of Justice or the *Nichibenren.*

123. *See id.* at 29-30 (quoting the response of the Japanese Embassy to a visa application from one of the attorneys from the Milbank firm).

124. *Id.* at 29. The letter from the Japanese Embassy to the attorneys said:

> The question whether a visa should be issued to [applicant] is not simply a matter of procedure; it raises the question of whether foreign attorneys should be allowed to practice in our country, and this is a basic and crucial question concerning the nature of the Japanese bar system. We have felt accordingly that it is necessary for the Japanese Government to work out a reasonable conclusion on this matter, paying due consideration to the intent of the Japanese Federation of Bar Associations . . . but until such time as a conclusion can be reached it has been decided that it will be best to freeze the status quo with regard to this problem and, accordingly, to withhold judgment on this particular application.

A. ALEXANDER & H. TAN, RAND REPORT, CASE STUDIES OF U.S. SERVICE TRADE IN JAPAN 42 (1984), *reprinted in* Section 301 Petition, *supra* note 3, at 29.

125. Shapiro, *Reclaiming a Place*, *supra* note 27, at 12, col. 2, *cited in* Section 301 Petition, *supra* note 3, at 31.

126. Section 301 Petition, *supra* note 3, at 32; *see id.* Exhibit E (giving the text of the USTR proposal).

127. *Id.* at 32. In the "Action Programme," the government said it would devise an appropriate solution, with the aim of revising the Practicing Attorneys' Law in the next session of the Diet. *Id.*

128. *Id.*; *see id.* Exhibit F (giving a translation of the resolution). The USTR immediately condemned the resolution in a press release on December 17, 1986. *Id.* at 33; *see id.* Exhibit G (giving the text of the press release).

129. *Id.* at 34.

Japan argued that their presence in Japan will help companies from the United States reduce the huge trade imbalance.[130] The USTR agrees that improvement in the international legal services area is an important aspect of eliminating the trade frictions between Japan and the United States.[131] The issue is intertwined with the deep cultural differences between Japan and the United States.[132] The cultural differences involved in this dispute include: perceptions of the different scope of activities of attorneys in the two countries,[133] Japan's perception of attorneys from the United States,[134] the right of a nation to regulate legal services,[135] fear of disruption of the domestic legal and social sys-

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130. *See* Berger, *Tokyo Considers a New Import — U.S. Lawyers*, BUS. WK., Apr. 28, 1986, at 40 (discussing the attorney imbalance between the United States and Japan). An attorney who represents the American Electronics Association in Tokyo stated that an army of attorneys from the United States could help companies from the United States in Japan track pending legislation, patent and copyright regulations, customs procedures, and product standards. *Id.*; *see also* Section 301 Petition, *supra* note 3, at 23 (calling the lack of more than a handful of law offices of United States firms in Japan a major reason for the $50 billion United States trade deficit and trade friction with Japan).

131. Office of the United States Trade Representative, *USTR Statement on Foreign Lawyers in Japan*, Dec. 17, 1985, *reprinted in* Section 301 Petition, *supra* note 3, Exhibit G. The Office of the United States Trade Representative believes that through the liberalization of trade in legal services the lawyers from the United States can "provide vital trade facilitation services." *Id.*

132. *See* Kanter, *supra* note 11, at 355-57 (discussing the cultural aspects of the dispute over the presence of foreign attorneys in Japan, such as the different roles of the attorney in the United States and the *bengoshi* and *sōgō shōsha* employee in Japan, and the different scope of their duties and responsibilities).

133. *See supra* notes 52-63 (comparing the attorney's role in the two countries).

134. *See For or Against - Gaikoku Bengoshi e no Horitsu Gyomu no Kaiho (For or Against - The Opening of Legal Services to Foreign Lawyers)*, Nichibenren Shimbun, Jan. 1, 1984, at 2 (stating in relevant part that the aggressive high-handed nature of certain attorneys and big law firms does not fit the social milieu of Japan), *cited in* Kanter, *supra* note 11, at 355 n.63; *see also* Symkowiak, *Oranges, Beef and . . . Lawyers?: A Strange Case of Trade Barrier Politics*, Japan Times, Dec. 28, 1983, at 11, col. 6, *cited in* Kanter, *supra* note 11, at 355 n.63 (quoting *bengoshi* Kunio Hamada as saying that it was somewhat imperialistic of the attorneys from the United States to contend that they could do whatever they wanted to do). The Japanese legal press portrays the attorneys from the United States as aggressive, highly competitive, and somewhat arrogant. Kanter, *supra* note 11, at 355 & n.63.

135. *See* Kanter, *supra* note 11, at 355 n.64 (quoting the 1985 position paper of the Japanese government, which stated that the right to regulate is a domestic law question and a matter of a country's legal system). The position paper said:

> Every country has . . . its own peculiar system of lawyers based on its historical background. Being a part of the fundamental structure of a state, the lawyer system of each country should be paid due respect. The introduction of a new system to accept foreign lawyers needs to be made with a basic recognition that this issue is tantamount to the reformation of the lawyer system itself which is deeply related to legal activities of the people.

Position Paper of the Japanese Side on Foreign Lawyers Issue for the Coming Consultation 7, (enclosed with an undated letter of approximately October 25, 1985 from Michihiko Kunihiro, Director General, Economic Affairs Bureau, Minister of Foreign

tem,[136] and fear that attorneys from the United States eventually will control the international legal services market.[137]

A. SECTION 301 OF THE TRADE ACT OF 1974

Congress enacted section 301 of the Trade Act of 1974 to combat practices of foreign governments that block United States goods or services from overseas markets, or that artificially divert goods or services to the United States.[138] After a petitioner files a petition, the USTR must determine within forty-five days whether to initiate an investigation.[139] If the USTR commences an investigation and determines that action is appropriate, the President may take countermeasures against the imports of an offender nation or impose similar restrictions on the right of that nation to engage in services in the United States.[140]

Affairs, to Michael B. Smith, Deputy United States Trade Representative), *cited in* Kanter, *supra* note 11, at 355 n.64. Similarly, it is unlikely that the American Bar Association would welcome criticism from foreign countries regarding domestic regulation of attorneys in the United States.

136. *See* Kanter, *supra* note 11, at 356 n.66 (citing statements of several *bengoshi* that the presence of attorneys from the United States would cause "culture shock" because the attorneys would introduce an "alien culture").

137. *See id.* at 356 n.67 (noting the fears of *bengoshi* that American and other international law firms with enormous organizational and economic backing will disrupt the international legal community in Japan, and the "liaison business" in Japan will lose business to foreign attorneys).

138. *See* Sandler, *Primer on U.S. Trade Remedies*, 19 INT'L LAW. 761, 779 (1985) (describing the usage of section 301). Part 2006 of section 15 of the Code of Federal Regulations defines the procedures for filing a complaint under section 301. 15 C.F.R. §§ 2006.0-2006.6 (1986). Section 2006.0(a) states:

> Section 301 of the Trade Act of 1974, as amended, authorizes the President to provide remedies for acts, policies or practices of foreign governments which are inconsistent with international trade agreements, or otherwise unreasonable, unjustifiable or discriminatory and burden or restrict U.S. commerce, or against failure of a foreign government to grant United States rights under a trade agreement.

Id. § 2006.0(a). One of the 1984 amendments makes the provision of section 301 expressly applicable to services. 19 U.S.C. § 2411(e)(1)(a) (Supp. III 1985).

139. 19 U.S.C. § 2412(a)(2) (Supp. III 1985). Any "interested person" can file a petition with the office of the USTR under 19 U.S.C. § 2412(a). The Trade Representative must review the allegations and decide whether to take any action. *Id.* § 2412(a)(1). Under 15 C.F.R. § 2006.3, "[w]ithin 45 days after the day on which the petition is received, the U.S. Trade Representative shall determine, after receiving the advice of the 301 Committee, whether to initiate an investigation." 15 C.F.R. § 2006.3 (1986).

140. *See* 19 U.S.C. § 2411(a), (b) (Supp. III 1985) (defining the possible actions the President can take); *see also* Sandler, *supra* note 138, at 779 (discussing retaliation as a method of protecting United States trade).

B. PETITIONERS' ALLEGATIONS

On March 28, 1986, the Ministry of Justice introduced a bill in the Diet proposing amendments to the regulations on foreign attorneys practicing law.[141] For over a year before the introduction of the bill, negotiators from the Ministry of Justice and the USTR tried to negotiate an agreement that would allow attorneys from the United States to open offices in Japan.[142] In response to the introduction of the Japanese bill, a group of attorneys from the United States submitted a petition pursuant to section 301 of the Trade Act of 1974.[143] The petitioners objected to the wording of the March 28, 1986 bill, claiming that it was an unacceptable basis for allowing attorneys from the United States to open offices in Japan.[144]

1. Reasons for Filing the Section 301 Petition

The petitioners had three purposes in filing the Section 301 Petition. First, they wanted to keep the "lawyers issue" on the agenda as a trade issue.[145] Second, they wanted to prevent Japan from believing mistakenly that the issue had been resolved on Japan's terms.[146] Third, they wanted to prevent Japan from believing incorrectly that the United States viewed the March 28, 1986 bill as the exclusive means for allowing attorneys from the United States to open offices in Japan.[147]

The petitioners were attorneys from the United States who wanted to provide legal and international trade facilitation services in Japan, and to compete with *bengoshi* and *sōgō shōsha* (trading companies).[148] The petitioners argued that to penetrate the Japanese market, businesses from the United States need access to attorneys from the United States.[149] If the United States could penetrate the Japanese market, the petitioners argued, the United States would help Japan convert the yen into an international currency and make Tokyo an international finance center.[150]

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141. Section 301 Petition, *supra* note 3, at 3.
142. *Id.*
143. *See id.* at 1 (noting the motivation of the attorneys from the United States in submitting the petition).
144. *See id.* at 8 (asserting that the bill would make it extremely difficult or impossible for the petitioners or other attorneys from the United States to open law offices in Japan to give advice on United States law).
145. *Id.* at 6.
146. *Id.* at 7.
147. *Id.*
148. *Id.*
149. *Id.* at 9.
150. *Id.*

2. Violation of FCN Treaty Provisions

The petitioners argued that when the government of Japan denied long-term commercial visas to the petitioners, the government prevented them from providing trade facilitation services and violated the petitioners' rights under articles VII and XXII of the FCN Treaty.[151] The petitioners objected to the restrictions that the bill placed on their ability to provide legal services in Japan on questions of United States law or United States "legal matters."[152] According to the petitioners, the *Nichibenren* dictated the conditions that allowed attorneys from the United States to open offices.[153]

The petition alleged that the Japanese government violated Article VIII of the FCN Treaty because the government had not granted visas to attorneys from the United States since March 4, 1978.[154] The petitioners argued that the Japanese government succumbed to the influence of the *Nichibenren* in denying their visa applications.[155] According to the petitioners, the *Nichibenren* opposed attorneys from the United States opening offices either as trade consultants or trading companies.[156] The petitioners argued that Article VIII(1) supersedes any Japanese professional licensing requirements.[157] Because Japan must fol-

151. *Id.* at 2. The petitioners alleged that the Japanese government either "froze" or denied visa applications if the petitioners revealed their intention to engage in legal work exclusively for United States nationals and companies in Japan. *Id.* at 1. They further alleged that when the Japanese government denied their visa requests, it was violating the FCN Treaty, which gave the petitioners the rights of national treatment and establishment. *Id.* at 8; *see also supra* note 14 (discussing the FCN Treaty provisions covering the rights of national treatment and establishment).

152. *See* Section 301 Petition, *supra* note 3, at 1 (noting the restrictive effects of the proposed bill).

153. *Id.* at 8.

154. *Id.*; *see also supra* note 110 (quoting the text of article VIII).

155. *See supra* notes 102-12, 116-22 and accompanying text (discussing the influence of the *Nichibenren* on the Ministry of Justice).

156. *See* Section 301 Petition, *supra* note 3, at 23-34 (recapping the history of the *Nichibenren*'s opposition to foreign attorneys and its influence on Japanese policy). In their analysis of the *Nichibenren*'s opposition, the petitioners included the 1972 Standards. *See supra* notes 102-12 and accompanying text (discussing the 1972 Standards). The petitioners also discussed the dispute over Isaac Shapiro's arrival in Japan. *See supra* notes 114-23 and accompanying text (explaining the dispute over Isaac Shapiro and the presence in Japan of the law firm of Milbank, Tweed, Hadley & McCloy).

157. Section 301 Petition, *supra* note 3, at 14. The Japanese Constitution does not clearly define the effect of treaties on domestic law. THE JAPANESE LEGAL SYSTEM, *supra* note 1, at 57. Under Japanese law, self-executing treaties should have force as domestic law as well as international law and take precedence over previously enacted domestic law in case of a conflict. *Id.* Other treaties, depending on the subject matter, are subject to provisions of the constitution covering their effect on domestic law. *Id.*; *see also* Fukuhara, *supra* note 1, at 603 (noting article 98(2) of the Japanese Constitution, which says treaties shall be faithfully observed, in support of the argument that an

low the FCN Treaty provisions, it must grant the requested visas.[158] The petitioners argued that preparing legal reports and examinations in fulfillment of their duties as trade facilitators did not constitute the unauthorized practice of law in violation of article 72 of the *Bengoshi Hō*,[159] unless they prepared the reports or examinations for a *hōritsu jiken* (legal case).[160]

The petitioners argued that attorneys perform virtually the same functions for American businesses that the *sōgō shōsha* employees perform for Japanese businesses.[161] These activities include collecting information on the market; monitoring laws, regulations, and government policies; understanding business practices; and acting as representatives in negotiations.[162] The activities of the *sōgō shōsha* in the United

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international agreement such as the FCN Treaty would take precedence over a domestic statute such as the *Bengoshi Hō*).

158. Section 301 Petition, *supra* note 3, at 14.

159. *Id.* at 10.

160. *See supra* note 110 (quoting the text of article VIII(1)); *see also supra* notes 97-101 and accompanying text (discussing the scope of article 72). The petitioners argued that the omission of the word "attorneys" in the second sentence of article VIII(1) did not indicate that the treaty excluded legal professionals from the provisions of the second sentence. Section 301 Petition, *supra* note 3, at 13-14. The petitioners argued such an interpretation would be improper because:

> (1) the FCN Treaty must be interpreted as a whole in light of its purpose to promote trade (*see* Vienna Convention on the Law of Treaties, 81 I.L.M. (1969) art. 31(1)); (2) use of the principle [*expressio unius est exclusio alterius* (expression of one excludes other)] must not be utilized to defeat the purpose of the FCN Treaty to promote trade (*see* 2A C. Sands, Sutherland's Statutes and Statutory Construction §§ 476.23-.35 (4th ed. 1984)); (3) it is inconceivable that the State Department, which drafted the treaty, intended that American business abroad be prohibited from obtaining American professional legal advice, which was as essential to American business in 1953 as it is now (see Exhibit B [of the Section 301 Petition]); (4) the negotiating history of the FCN Treaty, which must be referred to to clarify ambiguity (*see* Vienna Convention, art. 32; E. Fukatsu, Kokusai Ho Soron (General Theory of International Law) 224; S. Kyozuka, Zoku Joyakuho no Kenkyu (Continued Research on the Law of Treaties) 276 (1977)) clearly shows that both the American and Japanese negotiators understood the term "profession" to include all professions, including the legal profession, for the limited purpose of providing examinations and reports; (5) the term "accountants and other technical experts" simply means "professional persons" and (6) the term "attorneys" simply means "locally licensed legal representative" for court appearances and other legal representation.

Section 301 Petition, *supra* note 3, at 13-14. The petition also noted that the United States Department of State inserted an identical paragraph in the FCN Treaty with the Federal Republic of Germany to allow investigators to conduct special investigations without accusations that the investigators are illegally invading the regulated profession. *See id.* at 12-13 (comparing the clause in the Japan-United States FCN Treaty with the virtually identical clause in the FCN Treaty between the Federal Republic of Germany and the United States).

161. Section 301 Petition, *supra* note 3, at 15.

162. *Id.* at 16 (discussing international trade facilitation services that lawyers from the United States provide); *see also id.* at 17-21 (noting the remarkable degree of

States constitute legal services because attorneys provide the same services in the United States.[163] The petitioners argued that in Japan, however, the *sōgō shōsha* cannot provide the type of trade facilitation services that businesses in the United States require.[164]

The *sōgō shōsha* employees work in the United States under "treaty trader" visas.[165] The petitioners argued that attorneys from the United States are entitled to the closest Japanese equivalent to the "treaty trader" visas.[166] According to the petitioners, Japan was not willing to extend privileges that the United States already had extended to the employees of the *sōgō shōsha*.[167] The proposed regulations indicated to the petitioners that the Japanese Ministry of Justice had disregarded the needs of the United States for assistance in trade facilitation

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similarity between the Japanese *sōgō shōsha* employee and the American international attorney).

163. *Id.* at 19. These services include information about health and safety standards, import duties, advertising restrictions, local regulations, and maintenance of records and documentation. *Id.*

164. *Id.* at 21.

165. *See id.* at 14-15 (comparing long-term commercial visas with "treaty trader" visas). The United States Code defines a treaty trader as:

> an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such aliens if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national;

8 U.S.C. § 1101(a)(15)(E)(i) (1982).

Sōgō shōsha employees can also enter the United States pursuant to provisions under 8 U.S.C. §§ 1101(a)(15)(H) and (a)(15)(L):

> (H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability, . . . or (iii) who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him; . . . (L) an alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse or minor children of any such alien if accompanying him or following to join him; . . .

Id. §§ 1101(a)(15)(H)(i), (a)(15)(H)(iii), (a)(15)(L). Because the United States allowed Japanese "trade facilitators" to work in the United States under "treaty trader" visas, pursuant to the FCN Treaty, the petitioners argued that Japan should issue 4-1-5 long-term commercial visas, which they argued were the nearest equivalent to the treaty trader visas, to the attorneys from the United States. Section 301 Petition, *supra* note 3, at 14-15.

166. Section 301 Petition, *supra* note 3, at 14-15.

167. *Id.*

services.[168]

3. *Petitioners' Objections to Specific Provisions of the Proposed Law*

The petitioners claimed the bill was not acceptable for a number of reasons.[169] Among other things, the petitioners argued that the *Nichibenren* had total discretion to decide to admit a foreign attorney.[170] Second, the bill created special committees, separate from disciplinary procedures for Japanese attorneys and composed of only Japanese attorneys, to control and discipline the foreign attorneys.[171] Third, the bill permitted foreign attorneys to give advice only on the law of the state in which the attorney had practiced for five years.[172] Fourth,

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168. *Id.* at 33.

169. *Id.* at 34. The petitioners said the bill violated their right to "national treatment and right of establishment," and was "unfair, inequitable, unjustifiable, unreasonable, and discriminatory." *Id.*

170. *Id.* at 35. Article 10.3 states, "The Ministry of Justice shall, before granting approval, ask the opinion of the Japanese Bengoshi Federation." Foreign Attorneys' Law, *supra* note 19, art. 10.3. The petitioners were concerned that *Nichibenren* will exclude foreign attorneys because the *Nichibenren* fears economic competition, or because the foreign attorneys will cause "culture shock." Section 301 Petition, *supra* note 3, at 36-37. This fear has been a recurring theme in discussions about allowing foreign attorneys to practice in Japan. *See id.* at 37 (quoting several *bengoshi* on the consequences of allowing the attorneys and law firms from the United States to practice in Japan).

Article 10.3 states only that the Ministry of Justice shall "ask the opinion" of the *Nichibenren* before approving an application. Foreign Attorneys' Law, *supra* note 19, art. 10.3. It does not expressly grant the *Nichibenren* the authority to veto a Ministry of Justice decision nor does any other provision in the new law give the *Nichibenren* such authority. *But see* Foreign Attorneys' Law, *supra* note 19, art. 26 (allowing the *Nichibenren* to refuse to accept the registration of a "foreign-law *jimu-bengoshi*"). Article 26 states that if the *Nichibenren* finds that an applicant will "disturb the order or injure the reputation of a bengoshi association or the Japanese Bengoshi Federation," it can deny registration. *Id.*

171. *See* Section 301 Petition, *supra* note 3, at 39-40 (noting articles 55 and 56, which establish the "foreign-law *jimu-bengoshi*" disciplinary committee, and article 58, which establishes the "foreign-law *jimu-bengoshi*" discipline maintenance committee). The petitioners argued that because separate disciplinary committees oversee foreign attorneys, the committees will regulate the foreign attorneys in a different manner from other *Nichibenren* members, unlike the regulation of foreign attorneys in the United States. *See id.* (stating that national treatment and basic notions of fairness require the *Nichibenren* to use the same committees for regulating Japanese and foreign attorneys). This argument is flawed because the "foreign-law *jimu-bengoshi*" would not conduct the same activities as the regular *bengoshi*, and therefore the *Nichibenren* could discipline them separately.

172. *Id.* at 40. Article 3.1 states that, "the practice of a 'foreign-law *jimu-bengoshi*' shall consist of the performance of legal business concerning the law of the country of primary qualification." Foreign Attorneys' Law, *supra* note 19, art. 3.1. Article 2.0.2 defines "foreign country" as the states, territories, and other constituent units of a federal country. *Id.* art. 2.0.2. The petitioners interpreted these two articles as limiting the scope of the foreign attorney's practice to giving advice on the law of the home jurisdiction. *See* Section 301 Petition, *supra* note 3, at 40-41 (noting the

the petitioners argued that the limitation on the scope of practice also violated the FCN Treaty because the regulation treated the nationals of the two countries differently.[173] Fifth, the reciprocity requirements excluded qualified attorneys from the United States who were not from states that allow *bengoshi* to practice.[174] Sixth, the requirement of five years of actual experience excluded many "trainee" attorneys currently in Japan.[175] Seventh, the financial resources requirement violated national treatment because the regulations did not impose a similar requirement on *bengoshi*.[176] Eighth, the bill forbade foreign attorneys from employing *bengoshi*, but did not prohibit *bengoshi* from hiring foreign attorneys.[177] Finally, the bill prohibited foreign attorneys from accepting employment from a business enterprise or from serving as a director or officer of such an enterprise.[178]

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restrictive effect of the two articles).

173. *See* Section 301 Petition, *supra* note 3, at 42 (arguing that the limitation on giving advice on home state law would violate the provision for national treatment in the FCN Treaty). In the petitioners' view, the effect of the bill was to forbid attorneys from the United States to engage in activities in which the non-*bengoshi* are permitted to engage. *Id.* It is not clear why the petitioners objected because the petitioners do not want to practice under one of the categories of non-*bengoshi* legal professionals.

174. *See id.* at 43 (discussing the reciprocity requirement). Article 10.2 is a reciprocity provision allowing only those attorneys from jurisdictions according "substantially similar" treatment to *bengoshi* to practice in Japan. Foreign Attorneys' Law, *supra* note 19, art. 10.2. The petitioners argued there are no Japanese legal consultants in New York because the Japanese attorneys in New York have all taken the New York bar examination. Section 301 Petition, *supra* note 3, at 43. *But see supra* notes 70-72 and accompanying text (noting that at the time of the petition, only two states allowed foreign attorneys to practice law in the United States as foreign legal consultants).

175. Section 301 Petition, *supra* note 3, at 44. To qualify as a "foreign-law *jimu-bengoshi*," Article 10.1 requires an applicant to have five years of experience in the home jurisdiction. Foreign Attorneys' Law, *supra* note 19, art. 10.1. There is no provision to give the "trainees" currently in Japan credit for the time already spent in Japan. Section 301 Petition, *supra* note 3, at 44. A supplementary provision (Supplementary Provision 2) covers trainees working for a *bengoshi* at the time the law goes into effect. The petitioners allege that this will not help most trainees. *Id.*

176. Section 301 Petition, *supra* note 3, at 45 (discussing the financial resource and stability requirements for foreign attorneys).

177. *Id.* at 46. Articles 49.1 and 49.2 prohibit "foreign-law *jimu-bengoshi*" from employing *bengoshi*, or from entering into any joint enterprise or partnership with a *bengoshi*. Foreign Attorneys' Law, *supra* note 19, arts. 49.1 & 49.2.

178. *See* Section 301 Petition, *supra* note 3, at 47 (noting article 50.1, which prohibits an individual or a business enterprise from employing "foreign-law *jimu-bengoshi*," without first obtaining the approval of the local bar federation). Article 50.1 also prohibits "foreign-law *jimu-bengoshi*" from acting as directors or officers of a business enterprise. Foreign Attorneys' Law, *supra* note 19, art. 50.1.

4. The Positions of the European Business Council and the American Chamber of Commerce in Japan

Both the European Business Council (EBC)[179] and the American Chamber of Commerce in Japan (ACCJ) submitted position papers opposing the pending bill.[180] The EBC and ACCJ opinions reflect the views of the European and American business communities in Japan. Both organizations criticized the bill as an inappropriate solution to the problem of foreign attorneys practicing in Japan and a setback to the liberalization of international trade-in-services.[181]

The EBC favored a system that would encourage minimal regulation of the international practice of law and reciprocal treatment.[182] The EBC contended that such a system would indicate that the Japanese government was trying to eliminate barriers to trade, and endeavouring to make Japanese society more international.[183] The EBC argued that the bill protected Japanese attorneys excessively and did not open the market to foreign attorneys.[184]

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179. The EBC is comprised of the Belgian, Luxembourgian, British, Danish, French, German, Irish, Italian, and Dutch chambers of commerce in Japan.

180. European Business Council's Position Paper on the Bill Pending in the Diet of Japan Concerning Practice of Foreign Lawyers in Japan, Apr. 30, 1986 [hereinafter EBC Position Paper] (attached to a letter from C.C.N. Ryder, Chairman of the EBC, on behalf of the EBC, to the offices of the Prime Minister of Japan, May 2, 1986, *reprinted in* Section 301 Petition, *supra* note 3, Exhibit K to the Second Supplement; American Chamber of Commerce in Japan, *Legal Services* [hereinafter ACCJ Position Paper] (attached to a letter from Herbert F. Hayde, President of the ACCJ, on behalf of the ACCJ, to Prime Minister Yasuhiro Nakasone, May 12, 1986, *reprinted in* Section 301 Petition, *supra* note 3, Exhibit J to the Second Supplement.

The ACCJ and EBC sent their papers to the chairmen of the Standing Committees on Judicial Affairs in the House of Councillors and the House of Representatives, and the House of Representatives' Special Commission for International Economic Countermeasures. *Id.* They also sent papers to the Minister of Foreign Affairs, the Minister of Justice, the President of the ACCJ, the Head of the Delegation of the European Communities, and the *Keidanren* (Japan Federation of Economic Organizations).

The ACCJ also sent its position paper to officials at the American Embassy and to Clayton Yeutter, the United States Trade Representative. *Id.*

181. EBC Position Paper, *supra* note 180, at 1. On July 30, 1985, Prime Minister Nakasone announced an "Action Programme," a portion of which pertained to the liberalization of regulations on foreign attorneys. In his announcement, Nakasone said, "[p]aying due regard to the autonomy of the Japan Federation of Bar Associations, solutions appropriate both domestically and internationally are aimed to be reached, with the expectation of necessary amendment of the lawyers law in the next regular session of the Diet." *Id.* The EBC asserted that the draft law was not an internationally appropriate solution. *Id.* The ACCJ concurred with the EBC on that issue. Letter from Herbert F. Hayde, on behalf of the ACCJ, to Prime Minister Yasuhiro Nakasone, May 12, 1986, *reprinted in* Section 301 Petition, *supra* note 3, Exhibit J to the Second Supplement.

182. EBC Position Paper, *supra* note 180, at 2.

183. *Id.*

184. *Id.* at 1.

The EBC also criticized the provision requiring five years of experience in the home country before permitting a foreign attorney to practice in Japan.[185] The EBC stated that proof of admission to the bar of the foreign country should suffice.[186] The EBC also opposed the restrictions on foreign law offices in Japan hiring Japanese attorneys because no similar limitation existed for Japanese firms hiring foreign attorneys.[187] Furthermore, the EBC strongly objected to the *Nichibenren*'s control over the policy "liberalization" regarding foreign attorneys.[188] The main fear of the EBC was that the *Nichibenren* would be biased, and would promote the Japanese members' interests over foreign attorneys' interests.[189] The EBC requested an impartial body, such as the

185. *See* Foreign Attorneys' Law, *supra* note 19, art. 10.1.1 (stating that a foreign lawyer must engage in a practice for at least five years in the country where the foreign lawyer qualification occurred).

186. *See* EBC Position Paper, *supra* note 180, at 6 (stating that if Japan needs a short practice requirement of one year, it should be in any country, with the supervision of a locally qualified attorney, regardless of location). The EBC listed the practice requirements of several countries in the European Community. *Id.* The EBC noted that Belgium has no practice requirement for attorneys working as foreign legal consultants, although foreign attorneys-at-law working together with Belgian attorneys-at-law must have at least three years of practice in Belgium before a firm can make them partners. The same requirement applies to Belgian attorneys-at-law before partnership. *Id.* The Federal Republic of Germany has no statutory prior practice requirement for foreign legal consultants, although it may consider prior practice in the application process. *Id.* The United Kingdom has no practice requirement before a foreign attorney may practice. *Id.* France requires a foreign attorney to have three years of experience, and of this a lawyer already admitted in France must supervise one and one half years of these three years. *Id.* at 6.

In the opinion of the EBC, the requirement of a five-year stay in the home jurisdiction did not reflect the reality of modern international legal practice. *Id.* at 7. The EBC noted that most lawyers who had five years of experience had established practices they could not leave. *Id.*

187. *See id.* at 9 (arguing that the European law firm or European lawyer in Japan could not offer the comprehensive legal services that a Japanese law firm hiring European attorneys could offer). The EBC saw the denial of the right of association as a measure putting the Japanese attorneys at a competitive advantage. *Id.* at 11. The EBC asserted that professional ethics or malpractice liability could eliminate any concern about protecting consumers from improper legal advice of foreign lawyers. *Id.* at 7. The appropriate government agency, or the equivalent disciplinary authority of the foreign lawyer's home country, could address such problems. *Id.*

188. *See id.* at 1 (describing the "inherently and obviously anti-liberal nature of the draft law"). The EBC noted that other types of legal professionals like *zeirishi* (tax attorneys), *benrishi* (patent attorneys), and *kōnin kaikeshi* (certified public accountants) are not subject to the jurisdiction of the *Nichibenren*, although they provide legal services to some extent. *Id.* at 3.

189. *Id.* This fear was based on the EBC's perception of the *Nichibenren*'s past behavior of harassing foreign attorneys and refusing to accept foreign attorneys as the professional equivalents of the *bengoshi*. *Id.* Because the legal practice of the foreign attorney under the new system would differ significantly from that of the *bengoshi*, the EBC saw good reason why the *Nichibenren* need not supervise the foreign attorney. *Id.* at 4. *Nichibenren* supervision, they argued, would further restrict foreign attorneys

Ministry of Justice, the Ministry of International Trade and Industry, or the Supreme Court of Japan, to regulate the registered foreign attorneys.[190]

Similarly, the ACCJ expressed its opposition to the pending legislation. The ACCJ position paper outlined five basic requests. The paper described why the requests were important and criticized the response of the Japanese government.[191] First, for the new law truly to liberalize international legal services, the ACCJ argued that the Japanese government had to allow foreign law firms to provide comprehensive legal services.[192] The bill, in the opinion of the ACCJ, would allow only firms that assist Japanese businesses in improving market access and foreign investments to enter Japan.[193]

Second, the ACCJ, like the EBC, objected to the *Nichibenren*'s control over the foreign attorneys.[194] The new regulation required foreign attorneys to register with the *Nichibenren* and to join the national and local bar associations, but did not give the foreign attorneys voting rights in the associations.[195] The *Nichibenren* thus would have the power to discipline the foreign attorneys, but the foreign attorneys would have no representation.

Third, the ACCJ wanted a market that would be open in principle and closed only in exceptional situations.[196] The new law achieved the opposite effect, allowing a foreign lawyer to register in Japan only if the home jurisdiction gave a Japanese lawyer similar treatment.[197] The

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from providing a full range of legal services. *Id.* at 7. The EBC did not accept the *Nichibenren*'s argument that Japanese attorneys needed to place limitations on foreign legal practice to assure the quality of the legal services. *Id.*

190. *Id.* at 4. The EBC considered the Ministry of Justice an impartial body. *Contra* Section 301 Petition, *supra* note 2, at 8 (alleging that the Ministry of Justice accedes to the wishes of the *Nichibenren* on the issue of foreign attorneys in Japan).

191. ACCJ Position Paper, *supra* note 180, at 1.

192. *Id.* Allowing Japanese and foreign attorneys to practice together could solve the problems of access to markets and investment. *Id.*

193. *Id.* Other foreign enterprises would not receive the help of foreign law firms in Japan because the new bill prohibited foreign attorneys from giving advice about Japanese law. *Id.*

194. *Id.* at 2. In the opinion of the ACCJ, the *Nichibenren* was essentially the trade association of their competitors. *Id.* The opinion of the ACCJ noted the traditional opposition of the *Nichibenren* to the liberalization of the international legal services industry, and the harassment of foreign competitors through the *Nichibenren*'s disciplinary process. *Id.*

195. *Id.*

196. *Id.* at 3. The ACCJ described two types of sectoral responsibility. One is when the market is open, but can close if the reciprocal market closed, and such closing was harming exporters. *Id.* The other is when the market is closed, and opens only if the other market is opened first. *Id.*

197. *Id.*

Japanese market thus was closed in principle and open only in exceptional cases.[198]

Fourth, the ACCJ argued that the requirement of five years experience in the home country was counterproductive because there was a critical shortage of foreigners who were both able to speak Japanese fluently and familiar with Japanese business practices.[199] The ACCJ favored career paths or goals that would encourage such foreigners to spend time in Japan because it takes years of work to perfect these particular skills.[200] The requirement of five years experience in the home country would force the current "trainees" to leave Japan.[201] In addition, the five year obligation would not include the time the trainees had already spent in Japan.[202] Finally, the ACCJ objected to the prohibition in the bill against using any part of the name of the foreign firm in the name of the office in Japan.[203]

C. Petitioners' Requested Actions

The petition contained a number of important arguments and indicated why the USTR needed to commence an investigation. The petitioners requested the USTR to inform the Japanese government that: (1) the proposed amendment did not fulfill the needs of attorneys and businesses from the United States;[204] (2) the countries should recognize that the legislation was not the exclusive means of access, but merely a

198. *Id.* The ACCJ asserted such treatment was contrary to the idea of free trade. *Id.*

199. *Id.*

200. *Id.* at 4.

201. *Id.* This requirement would cause the trainees to lose the contacts already made, their familiarity with business customs, and their knowledge of the Japanese language, all of which would help make the trainees valuable international trade facilitators. *Id.*

202. *Id.*

203. *Id.* at 5. In the opinion of the ACCJ, such a restriction placed the United States firm at a competitive disadvantage. *Id.* They also asserted that a cultural aspect attaches to the use of the name. *Id.* Membership and pride in a person's company are very important in Japan. *Id.* This is in part related to the concepts of *giri* and personal honor. *See supra* notes 30-34 and accompanying text (discussing *giri*). Thus, this deprivation of their rights humiliated the foreign attorneys before their Japanese colleagues. ACCJ Position Paper, *supra* note 180, at 6.

204. Section 301 Petition, *supra* note 3, at 51. Specifically, the petitioners wanted to (1) act as "consultants" on United States business; (2) advise *bengoshi* on United States law, thus helping *bengoshi* with Japanese and third-country clients; and (3) make legal investigations and reports for United States clients about the Japanese business dealings of the United States clients. *Id.* at 51-52. The attorneys from the United States argued that article VIII(1) of the FCN Treaty permits such activities, and that the activities would not violate Japanese professional licensing requirements. Furthermore, they only would make investigations for United States nationals, United States companies, or *bengoshi*. *Id.* at 52.

means that attorneys from the United States could use directly to advise Japanese or third country nationals and companies;[205] and (3) the two countries should discuss agreements about granting long-term commercial visas to attorneys from the United States.[206] The petitioners requested action pursuant to section 301 of the Trade Act of 1974, if the Japanese government did not respond to the petition.[207]

III. RECOMMENDATIONS

The office of the USTR denied the Section 301 Petition on June 9, 1986.[208] It based its decision on the progress in negotiations with the Japanese and the Diet's enactment of the new attorneys' law on May 16, 1986.[209] At least one United States firm, however, was planning to open a branch office in Japan at that time.[210] The USTR's decision not

205. *Id.*

206. *Id.* at 61-62.

207. *Id.* at 52-55. The petitioners asked, first, that the USTR begin an investigation within 45 days of the petition. *See id.* at 52 (noting the requirement under 19 U.S.C. §§ 2411 and 2412(b)(2)). Second, they asked the USTR to recommend that the President order the State Department to deny the 8 U.S.C. § 1101(E), (H) and (L) visa applications of holders of law degrees from Japanese universities who are employees of the United States affiliates of the Japanese trading company branches, subsidiaries, and affiliates. They asked that the State Department continue to deny the visa applications until the Japanese government agrees to accept the visa applications of attorneys from the United States. *Id.* at 52-53. After the visa sanctions took effect, the petitioners wanted to begin negotiations for an amendment to the present law, or in the alternative, for a new foreign attorneys' law that would permit the licensing of attorneys from the United States in Japan. *Id.* at 53. The petitioners then asked the USTR to commence formal proceedings, if necessary, before the International Court of Justice, to interpret article VIII(1) of the FCN Treaty. *Id.* In addition, they wanted the USTR to recommend to the President that the State Department cease issuing visas in an overly broad manner to the employees of the Japanese subsidiaries incorporated in the United States. *See* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) (stating that the United States subsidiaries of a Japanese company are not companies of Japan, and that the FCN Treaty does not cover subsidiaries), *noted in* Section 301 Petition, *supra* note 3, at 53-54. The petitioners alleged that the State Department did not have the authority to decide whether a company incorporated in the United States is a company of Japan for visa purposes. Section 301 Petition, *supra* note 3, at 53-54. Finally, if the above measures were insufficient, they asked the USTR to recommend that the President ask the Secretary of Commerce to study violations of the FCN Treaty since 1953, to assess whether the United States should consider terminating the treaty with Japan. *See id.* at 54 (asking that such a study include the quantification, if possible, of the effects of such violations on the trade imbalance). If the results of the study were unsatisfactory, the petitioners wanted the President to give notice of the termination of the FCN Treaty to Japan. *Id.* at 55.

208. *See* Notice, 51 Fed. Reg. 21,037 (1986) (announcing that on June 9, 1986, the USTR decided to deny the petition).

209. *Id.*; *see* Section 301 Petition, *supra* note 2, Second Supplement, at 1 (noting that on May 19, 1986, the Diet passed the new law).

210. *Big U.S. Law Firm to Advance Into Tokyo Next Spring*, Nihon Keizai, Apr. 24, 1986, at 1, *reprinted in* Section 301 Petition, *supra* note 2, Exhibit M to Second

to conduct an investigation left attorneys from the United States uncertain how to operate under regulations they alleged were overly restrictive. The next round of General Agreeement on Tariffs and Trade (GATT) negotiations may solve some trade-in-services problems because the negotiators have agreed to include trade-in-services as a topic for discussion.[211] Creating a GATT services code, however, could take years. A GATT services code will not help the attorneys from the United States who presently want to open offices in Japan.[212]

The foreign attorneys who want to practice law in Japan cannot force Japan to change its laws if they want a viable solution to the issue of restrictive regulations on foreign attorneys. The attorneys from the United States should not attempt to force their way into Japan with threats of abrogating the FCN treaty. An alternative is for all state bar associations in the United States to change their regulations to allow foreign attorneys to practice under guidelines similar to the regulations New York and the District of Columbia adopted.[213] This would enable the two countries to exchange legal professionals reciprocally, as the new Japanese regulations allow.[214] The process of amending bar regulations is a lengthy one. Several states have rejected similar proposals, or have considered changes without coming to any agreement.[215] In addi-

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Supplement. Skadden, Arps, Slate, Meagher & Flom, a New York law firm, announced it would open a Tokyo office as early as April 1987. *Id.* Skadden's plans are threefold. First, they intend to serve as a consultant and intermediary for investments of Japanese enterprises in the United States. *Id.* Second, they plan to cultivate cases of capital participation and mergers. *Id.* Third, they plan to increase the participation of Japan in building construction, buying and selling of real estate, and energy development in the United States, especially in joint venture projects. *Id.* The firm will also collect and analyze information on trade between the United States and Japan, concentrating on the United States government, especially the Congress, and legal defense activities on behalf of Japanese enterprises involved in lawsuits. *Id.*

211. *Services are Included in Agenda for GATT*, Wall St. J., Oct. 1, 1975, at 35, col. 3.

212. *See* Auerbach, *Japan Said to Renege on Pledge to Let U.S. Lawyers Open Offices*, Wash. Post, Dec. 23, 1986, at C1, col. 2 (stating that on December 22, 1986, United States trade officials accused the Japanese government of reneging on its commitment to allow attorneys to open offices in Japan). Members of the international law section of the ABA threatened to file a trade complaint in response to the activities of the Japanese government. *Id.*; *see infra* notes 219-20 and accompanying text (discussing a second Section 301 Petition).

213. *See supra* notes 70-71 (discussing the New York and the District of Columbia regulations).

214. *See* Foreign Attorneys' Law, *supra* note 19, art. 10.2 (requiring substantially similar treatment of foreign attorneys in Japan and *bengoshi* in a foreign country).

215. *See* S. CONE, *supra* note 67, at 8-9 (giving examples of states that have changed or rejected changes in bar regulations). In 1983, California began considering a proposal for the licensing of foreign legal consultants. *Id.*; *see infra* note 225 (noting that California finally adopted regulations for foreign legal consultants, effective April 2, 1987). The Illinois Supreme Court rejected a proposal to license foreign legal consul-

tion, states with little or no connection to Japan have little incentive to modify their bar regulations.

Because most state bar associations are reluctant to allow foreign legal professionals to practice in their courts, or even to offer legal advice, attorneys from the United States should be sympathetic to the concerns of the Japanese legal profession. If the *Nichibenren* is anything like the state bar associations in the United States, attorneys from the United States should understand the *Nichibenren*'s reluctance to accept change. State bar examiners have allowed aliens to take state bar examinations only since *In re Griffiths* in 1973.[216] At the time of the petition, only New York and the District of Columbia had guidelines allowing a foreign attorney to offer legal services on the law of the foreign attorney's home jurisdiction.[217]

It makes no difference to the *bengoshi* that foreign attorneys only want to perform international trade facilitation services and not to practice law. The *bengoshi* only perceive foreign attorneys trying to force themselves into Japan and the Japanese legal profession. The same fears that a state bar has about an attorney from another state or country practicing within its jurisdiction also arise between the *Nichibenren* and the foreign attorney. The petitioners criticize the Japanese government for not recognizing the right of the United States to be different,[218] yet fail to recognize the right of Japan to be different. When the attorneys from the United States try to force the issue, the Japanese attorneys become increasingly convinced that attorneys from the United States are aggressive and arrogant.

CONCLUSION

As the international scope of business transactions increases, international trade-in-services increases as an important means of facilitating those transactions. The dispute between the *bengoshi* and the attorneys from the United States reflects the cultural and political clashes that have hindered liberalizations of international trade restrictions. Attorneys who want to practice law in a foreign country or who work with international companies must remember and respect the different cultural perceptions of the role of law in foreign countries.

The new Japanese law on foreign attorneys is a step in the direction

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tants in 1976. *Id.* at 19.

216. *See supra* notes 68-75 (discussing the restrictions on foreign attorneys practicing law in the United States).

217. *See supra* notes 70-71 (describing the regulations in New York and the District of Columbia).

218. Section 301 Petition, *supra* note 3, at 5.

of opening the doors of Japan to attorneys from foreign countries. The *Nichibenren* is reluctant to welcome foreign legal professionals into Japan. The state bar associations in the United States also hesitate to admit foreign lawyers without requiring them to pass a state bar examination. Although the activities of the *sōgō shōsha* employee and the international trade facilitator attorney are comparable, the debate should focus instead on a sovereign nation's right to regulate its legal profession, and the foreign attorney's willingness to work within these regulations.

POSTSCRIPT

On January 16, 1987, sixteen attorneys, qualified to practice law in the United States but residing in Japan, filed a second petition pursuant to section 301 of the Trade Act of 1974.[219] They filed the petition in response to the proposed regulations of the Japanese Ministry of Justice to implement the new law regulating the foreign attorneys in Japan on December 1, 1986.[220] In February 1987, the Japanese and United States governments announced a negotiated agreement.[221] The new regulations allow attorneys from the United States, who are licensed in or who have headquarters in jurisdictions that allow foreign attorneys to practice as "foreign legal consultants," to register for "foreign legal consultant" status in Japan.[222] Under one concession of the agreement, Japan will allow foreign attorneys to give advice on laws of the state, federal, or international jurisdictions they list on their applications.[223]

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219. Section 301 Petition, filed Jan. 16, 1987, (available at the Office of the United States Trade Representative, Washington, D.C.) [hereinafter Second Petition]. The USTR dismissed the Second Petition on March 2, 1987. 52 Fed. Reg. 7362 (1987).

220. Second Petition, *supra* note 219, at 1; *see also id.* Exhibit 2 (setting forth the text of the proposed ordinances). The *Nichibenren* also proposed regulations. *Id.* Exhibit 3. In summary, the attorneys objected to the new laws, regulations, and ordinances for several reasons: (1) the attorneys from the United States would be placed under the control of their Japanese competitors; (2) the new system restricted the scope of the foreign attorney's practice so that he or she could not compete effectively; (3) the Japanese government used reciprocity to keep the legal services market closed; (4) the new system blocked the career paths of attorneys from the United States who wanted to be Japan specialists; and (5) the new regulations prohibited the attorneys from the United States from using their own names as the names of the Japanese offices. *Id.* at 1-6.

221. Burgess, *Japan Opens Doors to U.S. Lawyers*, Wash. Post, Mar. 15, 1987, at A33, col. 3.

222. Coyle, *Practice in Japan OK'd for U.S. Lawyers*, Nat'l L.J., Mar. 16, 1987, at 3, col. 1. In May 1987, the Ministry of Justice admitted Robert Greig and Edward Greene from Cleary, Gottlieb, Steen & Hamilton, and E. Anthony Zaloom of Skadden, Arps, Slate, Meagher & Flom. *First U.S. Attorneys in Japan*, A.B.A. J., July 1, 1987, at 28.

223. *First U.S. Attorneys in Japan*, *supra* note 222, at 28; *cf. supra* notes 172-73

The United States conceded the ban on partnerships with the Japanese.[224] In addition, California, Hawaii, and Michigan amended their bar regulations to allow foreign attorneys to practice as foreign legal consultants.[225] California, the District of Columbia, Hawaii, and Michigan all adopted their rules in response to the negotiations concerning the foreign lawyers in Japan.[226]

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and accompanying text (discussing the requirement that the "foreign-law *jimu-bengoshi*" only advise on the law of the "home jurisdiction").

224. Burgess, *supra* note 221, at A33, col. 3; *see supra* note 177 and accompanying text (discussing the prohibitions on partnership). The ban on partnerships may account for the low number of attorneys applying for "foreign-law *jimu-bengoshi*" status. Miller, *Few Foreign Lawyers Apply to Practice in Japan*, Japan Times Weekly, May 23, 1987, at 5, col. 1. In addition, because the cost of opening an office in Japan is high, the initial number of law firms from the United States opening offices will be small. *First U.S. Attorneys in Japan*, *supra* note 222, at 28.

225. *See United States: Foreign Legal Consultant Rules of California, The District of Columbia and New York* [Apr. 2, 1987, Mar. 11, 1986, June 6, 1974], *reprinted in* 26 I.L.M. 977 (1987) [hereinafter *Foreign Legal Consultant Rules*] (giving a table of the five jurisdictions with foreign legal consultant rules). After the new Japanese regulations went into effect, Hawaii, California, and Michigan promulgated new regulations covering foreign attorneys who want to practice in those states. *Id.* Illinois and Texas also are considering proposals to license foreign attorneys to practice as foreign legal consultants. *First U.S. Attorneys in Japan*, *supra* note 222, at 28.

The new Hawaii rule is Rule 41 of the Supreme Court of Hawaii. *Foreign Legal Consultant Rules*, *supra*, at 977. The California Supreme Court adopted regulations for "registered foreign legal consultants" effective April 2, 1987. *See California Rules Concerning Foreign Legal Consultants* [Apr. 2, 1987], *reprinted in* 26 I.L.M. 980 (1987) (giving the text of new rule 988 of the California rules of court). Rule 5(E) of the Michigan Board of Law Examiners covers foreign legal consultants in Michigan. *Foreign Legal Consultant Rules*, *supra*, at 977.

226. *Foreign Legal Consultant Rules*, *supra* note 225, at 977.